COMMENTS OF MAINE ATTORNEY GENERAL JANET T. MILLS ON EPA'S REVIEW OF MAINE WATER QUALITY STANDARD REVISIONS AS THEY APPLY IN INDIAN TERRITORIES

SEPTEMBER 13, 2013

The State of Maine, by and through its Office of Attorney General, hereby submits the following comments in response to EPA's "Public Notice of EPA's Review of Maine Water Quality Standard Revisions as They Apply in Indian Territories." EPA seeks comments on the State's authority under the Maine Implementing Act, 30 M.R.S.A. §§ 6401 *et seq.* ("MIA") and Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICSA") to set water quality standards ("WQS") in Indian territories, and on whether these particular WQS revisions adequately protect water quality in Indian territories. Pursuant to the operative statutes, Maine has the authority and responsibility to establish WQS for all of the waters of the State, including any waters within or near Indian territories, and the statutes do not permit EPA or any of the Maine Tribes to set WQS in the State's stead, as is more fully explained below.

EPA's Current Review is Unlawful and Unnecessary

At the outset, we object to EPA's review process, which is unlawful. EPA's authority over state water quality standards is set forth at 33 U.S.C. § 1313(c)(3), which authorizes EPA to specify any changes to the proposed standards the agency believes are necessary under the Clean Water Act ("CWA") within 90 days of their submission. The standards in question here were submitted to EPA in January of 2013, and 90 days has long since passed. Therefore, EPA has no authority to require any changes to these standards in connection with their federal approval.

Additionally, there is no legitimate reason for EPA to establish a separate federal notice and comment process concerning these proposed standards. In its notice EPA says it is soliciting comment "in case" some members of the public were not aware that the State intended to apply

these standards to Indian waters. As the state rulemaking record makes clear, and as EPA knows well given its own participation in that process, one of the central issues commenters addressed was whether the standards were sufficiently protective of Indian subsistence fishers. These commenters included the Penobscot Nation and EPA, both of which submitted extensive comments, as well as the Houlton Band of Maliseet Indians. The record shows that Maine's Native American community was well aware of the rulemaking and actively participated in it. This being the case, it is a mystery which "members of the public" EPA believes may have missed their chance to comment at the state level because they were unaware these standards would apply to Indian territories. Once again EPA is acting as a "roving commission," presumably in order to justify an outcome where EPA has some new-found WQS jurisdiction. *See Michigan v. EPA*, 268 F.3d 1075, 1084-86 (D.C. Cir. 2001). Courts have been highly critical of EPA for similar maneuvering on state-tribal issues. *Id.* (criticizing and rejecting EPA effort to "create" jurisdictional controversy in order to justify imposition of a federal Clean Air Act program in "disputed" territory).

We also note that EPA has made no finding that Maine has inadequate authority to adopt and enforce its WQS within or adjacent to Indian territories. EPA cannot assert federal authority when it merely professes uncertainty regarding a state's jurisdiction over tribal territory; it must first make a formal finding that a state lacks jurisdiction. *Michigan*, 268 F.3d 1075, 1084-86. As the agency is surely aware, such a finding is precluded not only by the express terms of the MIA and MICSA, but also by the First Circuit Court of Appeals ruling in *Maine v. Johnson,* 498 F.3d 37 (1st Cir. 2007).

Pursuant to the MIA, Maine's environmental regulatory authority applies uniformly throughout the State, including to Indian lands and waters. 30 M.R.S.A. § 6204. When EPA

denied Maine delegation of the National Pollution Discharge Elimination System ("NPDES") program as to three tribal facilities on the grounds that the State lacked jurisdiction, the First Circuit vacated the decision, finding that the MIA is "about as clear as is possible" in conferring jurisdiction on the State over Indian lands and waters. *Johnson*, 498 F.3d at 43. EPA's reluctance to acknowledge the State's authority to adopt and enforce its WQS in Indian Territory today is reminiscent of the agency's now discredited decision-making on the State's NPDES application, but is inexplicable in light of the *Johnson* decision, which provides clarity on the jurisdictional issue.

EPA's Historical Treatment of Maine's Proposed WQS

For years, both before and after the 1980 passage of MIA and MICSA, Maine adopted and revised its WQS, submitted them to EPA for federal approval, and EPA acted on them, all without any mention of an issue regarding jurisdiction over Indian territories.[1] For example in 1986, Maine substantially revised and strengthened its WQS to protect its water resources and

[1] Four years after the passage of the Settlement Acts, EPA issued its 1984 "Policy for the Administration of Environmental Programs on Indian Reservations " ("1984 Policy"), *available at* http://www.epa.gov/tribal/pdf/indian-policy-84.pdf. That document specifically acknowledged that a state could have "an express grant of jurisdiction from Congress sufficient to support delegation to State Government." 1984 Policy at 2. This language is a clear reference to settlement acts such as MICSA. Not surprisingly, Maine commented on a draft of that document to make that connection, explaining "that a settlement act conferred state authority over the Penobscot Nation and the Passamaquoddy Tribe and thus 'ruled out the possibility of delegating any programs to the tribes.'" *The Origins of EPA's Indian Program*, 15 Kansas Journal of Law & Public Policy 191 at 294, fn. 497 (Winter 2006). EPA apparently accepted that at the time, just as it should have. But while "[t]he 1984 Policy remains the cornerstone for EPA's Indian program," EPA is now acting at variance with it in Maine, since the agency continues to resist that Congress has expressly granted jurisdiction over Indian territories to the State. EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011 at 4, *available at* http://www.epa.gov/tribal/pdf/cons-and-coord-with-indian-tribes-policy.pdf

designated uses. Me. Pub. L. 1985, c. 698, § 15, now as amended 38 M.R.S.A. §§ 464 *et seq.* These standards provided various classifications for different levels of protection, and specifically applied to every surface water in Maine, including waters in or near Indian territories, such as the Penobscot River. *Id.* at § 464(7). None of the standards or designated uses mentioned or provided any special protection to tribal interests or sustenance fishing. *Id.* EPA raised various unrelated concerns regarding these standards and their application to various waters, including those in or near Indian territories, without any mention that applying these standards to Indian territories required special EPA approval or triggered some different level of scrutiny.[2] In a letter dated April 24, 1987, EPA specifically discussed standards for the Penobscot River and its West Branch, with no mention of tribal issues.[3] Repeatedly and consistently, EPA approved Maine's proposed standards, even though the standards expressly applied to areas the Tribes claim to be within their territories.[4]

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[2] Letters dated July 16 and August 20, 1986, from EPA Regional Administrator, to DEP Commissioner (Exhibit (Ex.) 3).

[3] Letter dated April 24, 1987, from EPA Regional Counsel to Counsel to the Governor of Maine (Ex. 4).

[4] Letters dated June 28, 1999, from EPA Director, Office of Ecosystem Protection, to Acting DEP Director, Land and Water Quality (Ex. 11); March 25, 1993, from Acting EPA Regional Administrator to DEP Commissioner (Ex. 9); April 12, 1993, from EPA Chief, Water Quality Branch to DEP Commissioner (Ex. 10); December 20, 1990, from EPA Regional Administrator to DEP Commissioner (Ex. 8); May 11, 1989, from EPA Assistant General Counsel to Maine Deputy Attorney General (Ex. 7); November 3, 1988, from EPA Director, Waste Management Division, to DEP Director, Bureau of Water Quality Control (Ex. 6); May 21 and August 31, 1987, from EPA Regional Administrator to DEP Commissioner (Ex. 5). Moreover, EPA's earlier communications regarding Maine's WQS also did not mention any issue regarding tribal lands, waters or fishing rights. Letters dated November 12, 1985, from EPA Deputy Regional Administrator to DEP Commissioner (Ex. 2); February 20, 1985, EPA Regional Administrator to DEP Commissioner (Ex. 1).

At about the time Maine filed its application for NPDES delegation, EPA for the first time included language in its WQS approval letters indicating that the new and revised standards were approved except as to "Indian territory."[5] Maine has now repeatedly and in writing asked EPA to explain the legal basis for its refusal to approve its WQS as to Indian territory, asked which water bodies the agency considers to be within Indian territory, and asked what standards apply there if in fact Maine's do not. EPA has refused to answer these questions directly. The agency's handling of this issue has done nothing to help Maine citizens, including tribal members, but has created confusion where none should exist in the wake of the *Johnson* decision.

It should be noted here that EPA's official position today – that Maine's WQS do not apply within Indian territory because EPA never expressly approved them as applicable there – apparently has only theoretical meaning to the agency. EPA has reviewed dozens of draft permits for discharges on the Main Stem of the Penobscot River, including for a facility on the Penobscot Reservation at Indian Island, but has never once taken the position that Maine's generally applicable WQS did not in fact govern these applications. Of course, EPA could never take that position because if it did, it would have to point to some alternative set of standards that apply instead of Maine's, and would have to explain the legal basis for all of this, which is not possible. So while EPA on the one hand maintains that it has never approved Maine's WQS as to Indian territory, on the other hand it continues to apply Maine's standards to each and every CWA proceeding in the State.

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[5] Letters dated February 9, 2004 from Linda M. Murphy, Director, Office of Ecosystem Protection to DEP Commissioner; April 14, 2004 from Linda M. Murphy, Director, Office of Ecosystem Protection to DEP Commissioner and January 25, 2006 from Linda M. Murphy, Director, Office of Ecosystem Protection to DEP Commissioner (Ex. 12).

Similarly, whenever EPA itself issues a NPDES permit, the CWA requires a certification from the state pursuant to section 401, 33 U.S.C. § 1341, that the discharge complies with the state water quality standards and state law requirements. *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994). Maine has been issuing section 401 certification throughout the state, including in areas in or near claimed tribal waters, without any hint from EPA that jurisdiction to do so is lacking.

Maine's Authority under the MIA and MICSA to Establish WQS in Indian Territories

The Federal Water Pollution Control Act Amendments of 1972 instituted "a comprehensive program for controlling and abating water pollution." *Train v. City of New York,* 420 U.S. 35, 37 (1975). In establishing this regulatory framework, Congress was careful to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. § 1251(b).

It is now well-established that Maine has primary jurisdiction over the waters in the State, including any waters in or near Indian territory. The 1980 Settlement "provided that 'with very limited exceptions,' [the Tribe] would be 'subject to' Maine law...." *Johnson,* 498 F.3d at 42. One of the cornerstones of the MIA establishes:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S. § 6204. "[T]he then Interior Secretary's state[d] to Congress that the Settlement Acts were 'intended to effectuate the broad assumption of jurisdiction over Indian land by the State of Maine.' H.R. Rep. 96-1353 at 28, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3803-3804 (report of

the Department of the Interior)." *Johnson,* 498 F.3d at 45 n.10. This jurisdictional principle was confirmed and approved in MICSA. 25 U.S.C. § 1725.

> At the time the Settlement Acts were adopted, the Interior Department, largely responsible for relations with Indian tribes, told Congress that the southern tribes' lands would generally be subject to Maine law. H.R. Rep. 96-1353 at 28 (report of the Department of the Interior). The Senate Report, adopted by the House Report, declared that "State law, including but not limited to laws regulating land use or management, conservation and **environmental protection**, are fully applicable as provided in [the proposed bill] and Section 6204 of the Maine Implementing Act." S. Rep. 96-957 at 27; H.R. Rep. 96-1353 at 20.

Johnson ,498 F.3d at 43-44 (emphasis added). Congress understood that under the new law Maine would retain its environmental regulatory authority over the Tribes and their territories.

> The Senate Report stated that "for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulation or land use." S. Rep. 96-957 at 31.

Id. at 44 n.7.

In the face of this, EPA has previously asserted in *dicta* that it has a "trust responsibility" to "take over promulgation of" WQS insofar as they affect tribal waters (68 Fed. Reg. 65052, 65067-68 (November 18, 2003)). Maine strongly disagrees. First, "reservation" lands in Maine are *not* held in trust by the federal government. S.Rep.No. 96-157, 96th Cong., 2d Sess. ("Senate Report") 15 (1980); H.R.Rep. No. 96-1353, 96th Cong., 2d Sess. 15-16, *reprinted in* 1980 U.S.C.C.A.N. ("House Report") at 3791; *Bangor Hydroelectric Co. (Milford),* 83 FERC P61,037, 61,085-86 (1998).[6]

[6] The federal Department of Interior ("DOI") has previously stated that fee title to the islands in the Penobscot River was held by Maine in trust for the benefit of the Penobscot Indian Nation. *Bangor Hydroelectric Co. (Milford),* 83 FERC at 61,086. *See also, Mattaceunk Hydroelectric Project,* P-2520-072; Scoping Document 2, at § 2.2.1 (2013), *available at*

Second, to the extent that EPA could ever lawfully invoke a federal "trust responsibility" towards Indian territory in a manner that affects state jurisdiction under the CWA, such trust responsibility would not apply in Maine. Title 25 U.S.C. § 1725(h) of the federal Settlement Act makes clear that federal Indian law that would otherwise affect or preempt the jurisdiction of Maine relating to "environmental matters" has no effect in Maine. *Id.* § 1735(b).

Likewise, in 1987, Congress amended the CWA by, *inter alia,* adding section 518, which sets forth tribal rights and responsibilities. Section 518 allows Indian tribes to apply for "treatment as state" status. 33 U.S.C. § 1377(e). Generally, outside of Maine, a tribe may be granted jurisdiction to regulate water resources within its borders in the same manner as states. This includes the authority to establish tribal water quality standards subject to EPA approval, and the authority to issue NPDES permits for discharges into such waters. *City of Albuquerque v. Browner,* 97 F.3d 415 (9th Cir. 1996). Because it would affect Maine's regulatory jurisdiction and it was not made explicitly applicable to Maine, Section 518 does not apply in Maine. 25 U.S.C. § 1735(b). Indeed, Congress considered this very issue:

> This section does not override the provisions of the Maine Indian Claims Settlement Act (25 U.S.C. § 1725). Consistent with subsection (h) of the Settlement Act, **the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes...**

Water Quality Act of 1987, Section-by-Section Analysis, *reprinted at* 2 1987 U.S.C.C.A.N. ("1987 CWA Analysis"), at 5, 43 (emphasis added). EPA itself addressed the issue in a 1993 guidance document:

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http://elibrary.ferc.gov. ("*Beginning with the 1984 relicensing of the West Enfield Project, the Commission has consistently concluded that the United States does not have a proprietary interest in the aboriginal lands (i.e. the river islands) of the Penobscot Nation, and so these lands are not a "reservation" within the meaning of the Federal Power Act.*")

> [The provisions of the 1980 Federal Settlement Act] seem to invalidate federal laws that might give the Penobscots special status ... if it would 'affect or preempt' the State's authority, **including the State's jurisdiction over environmental and land use matters...**
>
> [A]ny post-1980 special federal legislative provisions that might give Indians special jurisdictional authority . . . could not provide the Penobscots with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

U.S. EPA Memorandum: Penobscot's Treatment as a State Under CWA, § 518(e), at 8 (July 20, 1993) ("1993 EPA Memorandum") (emphasis added) (Ex. 13).

Additionally, EPA has no "trust responsibility" toward Indian tribes except to the extent that Congress has created it by statute. The First Circuit has explained that the federal "trust responsibility" toward the Maine Tribes is fully and exclusively expressed through the substance of the statutes and regulations that an agency is charged with administering. *Nulankeyutmonen Nkihttaqmikon v. Impson*, 503 F.3d 13, 31 (1st Cir. 2007). To the extent that EPA attempts to breathe into this "trust responsibility" concept substantive or procedural requirements that are not embodied in statute, the agency is acting unlawfully. This conclusion is particularly compelling in the context of the CWA, because there is no written set of standards - narrative, numerical or otherwise - that anyone may review to assess whether a particular action complies with this "trust responsibility." For the agency to give this concept independent substantive or procedural meaning, therefore, is for the agency to grant itself license to handle any tribal issue in whatever way it sees fit, and declare the result to be compelled by a "trust responsibility." That is the height of arbitrary and capricious decision-making. *Michigan*, 268 F.3d at 1085 (rejecting EPA argument that its interpretation of the Clean Air Act is correct simply because it favors Indian interests). The notion that EPA has some free-floating, undefined, all-encompassing trust responsibility that is

understood only by the agency simply cannot stand, because it would effectively overwrite and render meaningless express provisions of the MIA and MICSA.

In sum, it is plainly obvious to all who wish to see that any waters arguably within Indian territories are to be treated like all other waters within Maine, the State has clear authority to issue WQS for these waters, and EPA has no trust responsibility that authorizes the agency to apply heightened scrutiny to Maine's WQS before approving them as to Indian Territory.

The Substantive Adequacy of Maine's WQS revisions

The CWA has deep roots in Maine, as Senator Edmund Muskie was the law's chief architect. Conistent with this legacy, Maine takes seriously its responsibility and commitment to protect water quality on behalf of *all* citizens throughout Maine, including sensitive subpopulations that engage in sustenance fishing. For reasons expressed in DEP's submission to EPA in support of the revised standards, which we incorporate by reference, the proposed standards establish human health criteria based on technically sound and objective data and analysis regarding cancer risk, fish consumption rates and bioconcentration. EPA itself has relied on some of the same studies and the same analytical approach in other contexts, and the human health criteria are grounded in the empirical, local population-specific data that EPA prefers. The rulemaking record shows that the DEP took into account all the evidence and argument that was presented, including by the Maine Tribes and EPA itself, and provided a reasoned decision supported by that record. On the merits, there is no basis for EPA to disapprove, require revisions to, or otherwise second-guess the outcome of DEP's rulemaking here.

Dated: September 13, 2013

JANET T. MILLS
ATTORNEY GENERAL

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Deputy Attorney General
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Exhibit 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

February 20, 1985

Henry E. Warren, Commissioner
Department of Environmental Protection
State House, Station #17
Augusta, ME 04333

Dear Commissioner Warren:

I have reviewed the water quality standards materials submitted by the Maine Department of Environmental Protection in accordance with Section 303(c) of the Clean Water Act. This package outlines the water quality sampling and public participation procedures and results that were the basis for the classification review. After extensive review, the Board of Environmental Protection decided that no classification changes be proposed to the Maine Legislature at this time.

Pursuant to Section 303(c) of the Clean Water Act Amendments of 1981 (PL97-117), I approve the Maine Water Quality Standards.

The Environmental Protection Agency, in its review of your standards package, both in the Regional Office and at Headquarters, has noted areas that should be addressed in the major revisions planned for 1985.

Modification in these areas will strengthen your water quality management programs and bring your Water Quality Standards into full conformance with federal regulations. I have attached detailed staff comments for your consideration.

I and my staff stand ready to assist you in the development of your water quality standards revision to be submitted to the Maine Legislature this year. I look forward to continued cooperation with you and your staff to achieve the water quality objectives expressed in the Maine Water Quality Standards.

Sincerely yours,

Paul Keough, Actng

Michael R. Deland
Regional Administrator

cc: Jennie Bridge, NEIPCC
Patrick Tobin, Dir., Criteria & Standards Div. (WH-585)
Frank Ciavattieri, WMF-2111

Attachment

Comments on Maine Water Quality Standards

Attached to February 20, 1985, letter from

Michael R. Deland to Henry E. Warren

1. The antidegradation section, 3.b., should be modified to be consistent with EPA regulation 40 CFR 131.12, November 8, 1983. The following areas need attention:

   a. Your policy protects designated uses. In addition, any existing uses must also be protected.

   b. It is unclear as to why a water that has water quality greater than specified for its class will have that water quality protected only if the designated uses of the next highest classification can be attained. High water quality must be maintained in any event. There are degrees of water quality within a classification. Those higher levels water quality should be protected even if they are by some measures insufficient to meet the next highest classification.

   c. The intergovernmental and public participation processes should be spelled out. This is critical in order to determine when the "economic or social purposes which provide significant public benefits for the People of the State of Maine" are justified by allowing lowered water quality.

   d. Maine must explain how cost effective and reasonable best management practices for nonpoint source control will be assured where lower water quality is allowed.

2. In section 3.d., "Discharge prohibited," after the word "new," "or increased" should be added.

3. B-1, B-2 and other classifications that have been eliminated should have their references deleted in the associated regulations.

4. We suggest that instead of allowing a blanket waiver to the bacterial criteria between October 1 and May 14 each year that permittees be required to apply for a waiver. The permittees should explain why suspension of disinfection will not adversely affect water quality and uses.

5. As discussed with you, the words "of human origin" in the bacterial section should be deleted. It can be replaced with a phrase at the end of the sentence "unless determined to be of non-human origin by sanitary survey."

6. The toxicity statement in paragraph 3 on page 4 should be expanded preferably in accompanying regulations, to explain how determinations of aquatic protection will be documented or predicted. Further, the connection between the toxicity policy in the Standards and the issuance of discharge permits should be clearly outlined. This will include information on biomonitoring, effluent toxicity testing, choice of river flow duration and recurrence intervals for acute and chronic protection, etc.

7. Consideration should be given to having a Class C cold water fishery designation with a dissolved oxygen of 6.0 instead of 5.0 mg/L. This is supported in a paper "The Dissolved Oxygen Requirements of Fish" prepared by the Maine DEP in April 1984.

8. There is an apparent inconsistency in the SB criteria and uses designated for this class, namely shellfishing. A designation of SB implies that shellfishing and its stringent microbiological requirements are protected. However, during the period between October 1 and May 14 each year, coliform criteria are waived meaning that water quality which protects shellfish harvesting may not be maintained. Shellfishing, nevertheless, continues during this period. This discrepancy should be eliminated.

9. The chromium criterion in the regulations should be reconsidered. It is different from the EPA "White Book" value, which both EPA and DEP have been using, most recently in the Saco River and Goosefare Brook.

10. The variance language in Chapter 590 should be expanded to include social and economic factors, intergovernmental cooperation and public participation.

11. A mixing zone policy considering the factors in the EPA "Water Quality Standards Handbook" Chapter 2 should be developed.

Exhibit 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

November 12, 1985

Henry E. Warren, Commissioner
Department of Environmental Protection
State House, Station 17
Augusta, ME 04333

Dear Commissioner Warren:

Members of our staffs met in your offices on October 9, 1985, to discuss the legislative document amending the water classification system prepared for the 1986 session of the Maine Legislature. This meeting was set up to discuss points originally raised by the Environmental Protection Agency (EPA) in response to earlier drafts of Legislative Document No. 1503.

Three major issues were deliberated: (1) antidegradation policy, (2) bacterial criteria for SB water for shellfish harvesting and (3) the absolute prohibition of discharges, new and existing, to streams with less than ten square miles of drainage area. EPA's position and my understanding of future actions are detailed below.

(1) Antidegradation - Maine's current proposal is contrary to EPA policy in that:

(a) existing uses are not specifically protected. EPA's antidegradation policy mandates that existing uses be preserved in all cases. Maine protects "characteristics and designated uses" without specifically providing maintenance of actual existing uses. In order to be consistent with federal regulations, your proposal must provide for the protection of existing uses; and

(b) water quality currently exceeding that necessary for the propagation of fish, shellfish and wildlife need not be maintained. Maine's proposal protects only the minimum requirements of a class unless the quality exceeds that specified for the next highest class. EPA's policy protects all incremental improvements in water quality subject to the standard waiver provisions. For example, a class C waterway with a dissolved oxygen criterion of 5 mg/L and an existing D.O. of 6.5 mg/L is not protected at this higher level by Maine's policy. This is because the 6.5 mg/L is less than the criterion of 7 mg/L in the next highest class, B. Similarly, a class B water with a higher than minimum D.O. may never be guaranteed preservation since the next highest class, A, has an identical D.O. criterion of 7 mg/L.

Based on the discussions held by our staffs including EPA headquarters, we understand that the Department of Environmental Protection (DEP) and the Office of Legislative Assistants will revise the Maine antidegradation policy to bring it into conformance with approved water quality standards in other states. One important aspect in implementing the antidegradation policy is the procedure by which the benefits and costs of maintaining high quality water are evaluated and trade-offs made regarding important economic or social development. This procedure must involve intergovernmental coordination at the State level as well as public participation. These procedures, currently not elucidated by Maine, need not be incorporated into the statute but can be developed and spelled out in the Continuing Planning Process.

(2) Bacterial criteria - Maine dropped bacterial criteria from the SB classification, waters protected for the propagation and harvesting of shellfish. EPA defines a water quality standard as listing of designated uses and criteria to protect those uses. EPA has bacterial criteria in the "Red Book" that are protective of shellfish waters. These criteria or other state supported criteria should be specified for those water bodies that contain a designated or existing use for shellfish harvesting.

I understand that DEP is considering bacterial criteria for SB waters and will continue discussing the matter with EPA and the Maine Division of Marine Fisheries.

(3) Discharge prohibition - Lines 1 through 5, page 3 of L.D. 1503, state that there shall be no discharge to waters with less than 10 square miles drainage area. This language would require the removal of all current discharges to such waters ranging from large industrial dischargers to single homes. As discussed during the meeting this may not be realistic. Your staff is reconsidering this point and will make a recommendation soon.

In closing I commend you, your staff, and the Office of Legislative Assistants for the tremendous effort put into clarifying and strengthening Maine's water quality standards, particularly with regard to great ponds. I share your desire for early legislative action on the proposal. Please let me know if we can assist in any way with the revising and updating of your standards and classifications.

Sincerely yours,

Paul Keough

Paul Keough
Deputy Regional Administrator

cc: David Elliott, Office of Legislative Assistants
David K. Sabock, Criteria and Standards, WH-585
Jennie Bridge, NEIWPCC

Exhibit 3

UNITED STATES ENVIRONMENTAL PROTECTI

REGION I

J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACH

July 16, 1986

Kenneth C. Young, Commissioner
Department of Environmental Protection
State House, Station #17
Augusta, Maine 04333

Dear Commissioner Young:

We have reviewed the revisions to the Maine water quality standards statute contained in "An Act to Amend the Classification System for Maine Waters and Change the Classification System of Certain Waters," Maine Public Laws, 112th Legislature, Chapter 698 (the "Reclassification Act").

We would like to applaud your efforts, as well as those of your staff and the legislature on this important bill which in many ways strengthens the protection afforded to Maine's waterways.

We formally approve major portions of the statute, but there are several sections of the bill listed below which do not appear to be in conformance with federal requirements. The state must specify within 30 days how it intends to meet the concerns listed below or the Environmental Protection Agency (EPA) will disapprove those sections.

1. Section 464(4)(F); Antidegradation

Maine's Antidegradation Policy, as set forth in Section 464(4)(F) of the Reclassification Act, must be consistent with 40 C.F.R. §131.12 (a)(1)-(4). Forty C.F.R. §131.12(a)(1) provides that "existing instream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Forty C.F.R. §131.12 (a)(2) goes a step further and provides that if the level of the water quality exceeds that which is necessary to protect the Section 101(a)(2) ("fishable/swimmable") goals of the Clean Water Act, then the water quality cannot be lowered below the level necessary to support the existing use (i.e., "fishable/swimmable" or higher) and, in addition, can only be lowered to that level if the state finds, after intergovernmental coordination and public participation, that such action is necessary for important economic or social development.

Section 464(4)(F)(5) appears to be more stringent than 40 C.F.R. §131.12 (a)(2) in one respect since it provides that the existing quality of any water body, not just "fishable/swimmiable" waters, can be lowered only after the board makes a finding, "...following opportunity for public participation, that the action is necessary to achieve important economic or social benefits..." Section 464(4)(F)(5), however, does not provide

that in allowing lower water quality in such circumstances the state must assure water quality to fully protect existing uses. Section 464(4)(F)(1) does affirmatively state that the existing uses must be protected. However, this is a general provision and Section 464(4)(F)(5) can be interpreted as an exception to the general rule in Section 464(4)(F)(1). Section 464(4)(F)(5), therefore, needs to be clarified. We recommend that this be accomplished either in the rules promulgated pursuant to Section 464(5) or by statutory amendment.

Section 464(4)(F)(5) is missing a requirement for "intergovernmental coordination". In addition, the provision does not provide that Maine will "...assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost effective and reasonable best management practices for non point source control" [See, 40 C.F.R. §131.12(a)(2)]. The state should adopt this language into a statutory revision or during the rulemaking pursuant to Section 464(5).

2. Section 464(4)(F)(1); Definition of "Existing Use"

In accordance with 40 C.F.R. §131.12(a)(1), Section 464(4)(F)(1) of the Reclassification Act provides that existing uses must be maintained and protected. This section, however, defines "existing instream uses" as "significant, well-established uses that have actually occurred on a waterbody on or after November 28, 1975" (emphasis added). This language is narrower and therefore less stringent than the federal definition in 40 C.F.R. §131.3(e) which defines "existing uses" as "uses actually attained in the waterbody on or after November 28, 1975 whether or not they are included in the water quality standards." The EPA policy on antidegradation provides that existing uses can be established not only by demonstrating that the uses have occurred but also by showing that "...the water quality is suitable to allow such uses to occur (unless there are physical problems which prevent the use regardless of water quality)" (emphasis added)1/. Under Maine's definition, however, the use is existing if it is "well-established" and if it has "actually occurred". The addition of this language appears to preclude the state from finding a use exists because the water quality of the reach is suitable to allow such a use to occur.

Therefore, EPA requests that the Maine Department of Environmental Protection (DEP) clarify how it specifically intends to implement the antidegradation policy outlined in the legislation. In particular, EPA requests DEP's interpretation of the definition of existing uses contained in the legislation and the methods by which DEP will establish existing uses.

1/ See, "Questions and Answers on: Antidegradation", August, 1985, Office of Water Regulations and Standards.

3. Sections 465(2)-(4); Protection of Salmonid Spawning

The standards provide for narrative salmonid spawning protection for Class B and Class C waters. Criterial protection for salmonid spawning with regard to dissolved oxygen is afforded only to Class B waters.

Maine should afford at least as high a degree of salmonid spawning protection to Class A waters as Class B waters. In addition, rulemaking specified in Section 465(4)(B) should identify salmonid spawning areas in Class C waters and the level of water quality sufficient to support spawning, egg incubation, and the survival of early life stages.

4. Sections 467(1)(A)(2) and 467(7)(A)(3); Androscoggin and Penobscot River Impoundments

These sections do not provide for the full protection of Class C standards and criteria within the stated impoundments, only the reasonable attainment of Class C uses, while allowing the violation of Class C criteria at certain times. By allowing the "reasonable" attainment of the uses these two provisions are inconsistent with federal regulations. The language in 40 C.F.R. §131.6(c), as well as the federal regulation as a whole, make it clear that these uses must be fully protected, not "reasonably" protected.

Furthermore, in Section 464 of the Reclassification Act the legislature stated that its intention was that: "This classification system shall be based on water quality standards which designate the uses and related characteristics of those uses for each class of water and which also establish water quality criteria necessary to protect those uses and related characteristics." Thus, the classification system for the impoundments in question does not follow the intent of the legislature or the structure which has been established to protect all other waterbodies in the state since it does not require criteria which fully protect the instream uses.

The statement by the legislature in these sections that criteria violations may occasionally occur and that Class C uses may be reasonably attained does not constitute a revision of the classification for these segments. If the intent of the legislature was to remove designated uses (which are not existing uses) or to adopt subcategories of uses pursuant to 40 C.F.R. §131.10(g), the State must first conduct a use attainability analysis ("UAA") in accordance with 40 C.F.R. §131.10(j)(2). A UAA is defined in 40 C.F.R. §131.3(g) as "a structured scientific assessment of the factors affecting the physical, chemical, biological, and economic factors described in 40 C.F.R. §131.10(g)". The study should focus on the current condition of the impoundments in question and the factors relating to their attainment or nonattainment of Class C standards. The study should also outline what the attainable uses of the impoundments are, specify how those attainable uses will be achieved, and select criteria protective of the those uses.

If the UAA concludes that the impoundments will not fully attain Class C uses and criteria due to one or more of the factors listed in 40 C.F.R. §131.10(g), the state may then reclassify (in accordance with the provisions of 40 C.F.R. §131.10) the designated Class C uses or create subcategories of Class C uses for these reaches and specify criteria protective of these uses.

EPA requests clarification of how Maine intends to bring this section of the standards into full compliance with the federal requirements listed above.

Forty C.F.R. §131.2 states that water quality standards "...serve as the regulatory basis for the establishment of water quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act." Since a standard of "reasonable" attainment is vague and there is no way to determine what level of water quality the state would equate with "reasonable" attainment, it would be difficult, if not impossible, to establish water-quality based treatment controls.

Since the impoundments have not been formally downgraded by the legislature, Region I will continue to interpret the classification of the reaches in question as Class C. NPDES permits issued by EPA for these segments will contain water quality based limitations sufficient to support Class C uses and criteria (i.e., 5 mg/l minimum dissolved oxygen concentration) fully until such time the standards for these streams are downgraded in accordance with federal requirements.

Miscellaneous comments on the Maine water quality standards are listed below.

Section 465-C; Groundwater Classification

This section sets standards of classification for groundwater. Groundwater is not addressed in Section 303 of the CWA. Therefore, EPA does not possess the authority to approve or disapprove this section.

Chronic Criteria For Dissolved Oxygen

EPA has recently published (June 24, 1986 federal register) dissolved oxygen criteria which include suggested average and minimum criteria, rather than just the minimum values used in Maine's current standards. Maine should examine this document when updating its standards again.

Hydroelectric Projects Act

EPA has recently received a second piece of legislation: "An Act to Clarify the Application of Water Quality Standards to Hydroelectric Projects," Maine Public Laws, 112th Legislature, Chapter 772. Since this legislation dictates how water quality standards are to be applied, EPA approval of this Act under 40 C.F.R. Part 131 is also required. Initial review of the Act has revealed that it is inconsistent with federal requirements. EPA needs additional time to review this legislation and will contact the state as soon as it completes its evaluation.

I look forward to working with you in the resolution of the aforementioned issues. If you have any questions, please feel free to contact Don Porteous (617-223-5043), or Larry Brill (617-223-5600) of the Water Management Division for assistance.

Sincerely,

Paul Keough, Acting

Michael R. Deland
Regional Administrator

cc: Jennie Bridge, NEIPCC
David K. Sabock, Criteria and Standards Division, (WH-585)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

August 20, 1986

Kenneth C. Young, Commissioner
Maine Department of Environmental
Protection
State House Station #17
Augusta, Maine 04333

Dear Commissioner Young:

As I mentioned in my letter of July 16, 1986, the Environmental Protection Agency (EPA) recently received a copy of "An Act to Clarify the Application of Water Quality Standards to Hydroelectric Projects" (Hydroelectric Projects Act), Maine Public Laws, 112th Legislature, Chapter 772, L.D. 2107. EPA approval of this Act is required under 40 C.F.R. Part 131 because this legislation concerns the reclassification of water quality standards.

Our review of the Act reveals that Sections 363-C and 634(1) are not in conformance with federal requirements. The State must specify how it intends to meet the concerns listed below within 30 days of receipt of this letter or EPA will disapprove the non-conforming portions of the Act.

I. Section 363-C; Classification for Certain Hydroelectric Impoundments

Section 363-C of the Hydroelectric Projects Act provides that:

> For the purposes of water quality classification, the waters of a new or proposed hydroelectric impoundment shall be deemed to be Class GP-A if the commissioner finds that it is reasonably likely that the impoundment would: 1)...[t]hermally stratify; 2)...[e]xceed 30 acres in surface area; and 3)... [n]ot have any upstream direct discharges, except for cooling water.

To "deem" a waterbody a different classification than its present classification is, in effect, a reclassification of that waterbody. Although a state may redefine its classification system under the federal water quality regulations, it is subject to the constraints listed in 40 C.F.R. Part 131. Our review indicates that Section 363-C does not meet the requirements of 40 C.F.R. Part 131 for the following reasons:

A. Section 131.10(e) specifically states that "[p]rior to adding or removing any use...the State shall provide notice and an opportunity for a public hearing...under 40 C.F.R. § 131.20(b)." Section 363-C does not meet the requirements of Section 131.10(e) because it does not provide for such public participation even though a change from Class AA to Class GP-A under this section would involve both the removal and addition of uses.

B. Since a change in classification from Class AA to Class GP-A under Section 363-C would remove the free-flowing characteristic uses of the stream without adding criteria or uses which are more protective of the stream, this section is also in conflict with Section 131.10(h). Section 131.10(h) specifically provides that a state may not remove an existing use unless a use requiring more stringent criteria is added.

C. Contrary to 40 C.F.R. 131.20(c), the Commissioner can revise its water quality standards by reclassifying certain waterbodies under Section 363-C without the approval of EPA. Section 131.20(c) specifically requires the EPA Regional Administrator's approval of revisions to water quality standards. It should be noted that until the revisions are formally approved by EPA, Section 401 certifications cannot be granted by the State to hydroelectric projects.

D. The three findings that the Commissioner must make in order to deem the waters of new or proposed hydroelectric impoundment Class GP-A seem to be inconsistent with the designated uses and criteria protective of Class GP-A waters in Section 465-A of "An Act to Amend the Classification System for Maine's Waters and Change the Classification System of Certain Waters" (Reclassification Act). Section 363-C provides that any waterbody may be deemed Class GP-A if there are no upstream discharges, except cooling water while that classification is characterized in the Reclassification Act as having no new discharges upstream. EPA requests that the State clarify the apparent discrepancy between the prohibition of certain discharges to Class GP-A waters in the two provisions.

II. Section 634, Subsection 1; Coordinated Permit Review

Section 634(1) of the Hydroelectric Projects Act requires the Department of Environmental Protection (DEP) to issue or deny Section 401 water quality certification within five days of the applicant's request. Failure to act on the certification request results in the waiver of the State's certification determination. This time period is unreasonably short and therefore in conflict with Section 401(a)(1) of the Clean Water Act which provides that the certification authority of the State will only

be waived if the State fails or refuses to act within "a reasonable period of time, not to exceed one year." Further, such waivers are to be made in writing as specified at 40 C.F.R. 121.16 and cannot be made by default.

Please feel free to call the members of my staff to discuss these issues. Questions regarding this matter should be referred to David Lederer at 617-565-3539.

Sincerely,

Paul Keough, Acting

Michael R. Deland
Regional Administrator

cc: Jennie Bridge, NEIPCC
David K. Sabock, Criteria and Standards Branch, EPA

Exhibit 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

LD 391

April 24, 1987

Robert A. Moore,
Legal Counsel to the
Governor of Maine
State of Maine
Office of the Governor
Augusta, Maine 04333

Re: Maine Water Quality Standards

Dear Mr. Moore:

Thank you for your March 24, 1987 letter regarding EPA's concerns relating to L.D. 391 and other recently passed water quality legislation in Maine. In your letter you requested a list of (1) the changes in Maine law which reflect the recent trend in the State toward the relaxation of water quality standards to allow specific projects to be certified outside normal State procedures and (2) the identity of such specific projects. The changes to Maine's standards which reflect this trend are set forth in detail in our earlier letters of July 16 and August 20, 1986 (copies of which are attached) and our recent letter of March 6, 1987. Set forth below is a summary of several points in these letters which relate to your questions:

(1) 38 M.R.S.A. §§ 467(1)(A)(2) and 467(7)(A)(3) provide for the "reasonable" attainment of Class C standards in certain impoundments on the Androscoggin and Penobscot Rivers which are downstream of the Boise Cascade, International Paper, and Great Northern paper mills. Inasmuch as the legislature intended to provide for the establishment of water quality-based permit limits which would be less stringent than those required for full attainment of Class C uses and criteria, these sections are inconsistent with the water quality standards (see, July 16, 1986 letter).

(2) 38 M.R.S.A. § 363-C automatically reclassifies, without the public participation or EPA approval required by federal law, any proposed hydroelectric impoundment that has certain characteristics to a Class GP-A which has no dissolved oxygen criterion. This legislation was enacted after the Board of Environmental Protection's decision to deny certification for the construction of a dam by Great Northern on the West Branch of the Penobscot River. The decision was based partially on the fact that the resulting impoundment would be unable to meet the dissolved oxygen criterion for the existing classification (see, August 20, 1986 letter).

(3) Section 6 of L.D. 391 attempted to alter the temperature criterion for the Class C waters behind the Hackett's Mill dam in order to relax the discharge requirements to be applied to the Falls Tissue plant in Mechanic's Falls (see, March 6, 1987 letter). It is our understanding that section 6 has been deleted from the bill.

EPA recognizes that no specific project has yet been certified under any of the above-referenced statutes; however, we are concerned over the trend in Maine toward the passage of such legislation and are pleased to see that the Governor's office is interested in taking an active role in investigating this matter. If we can be of any further assistance in your efforts please feel free to contact either David O. Lederer of the Water Management Division or Tonia D. Bandrowicz of the Office of Regional Counsel at (617) 565-3539 or (617) 565-3450, respectively.

Sincerely,

Patrick A. Parenteau
Regional Counsel, Region I

Enclosures

cc: Dean Marriott

Exhibit 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

May 21, 1987

Dean Marriott, Commissioner
Maine Department of Environmental
Protection
State House, Station No. 17
Augusta, ME 04333

Re: L.D. 2283 and 2107

Dear Commissioner Marriott:

As you know, by letters dated July 16 and August 20, 1986, I informed the State of Maine Department of Environmental Protection ("DEP") of the results of the Environmental Protection Agency's ("EPA") initial review of "An Act to Amend the Classification System for Maine Waters and Change the Classification System of Certain Waters" (the "Reclassification Act"), L.D. 2283, and "An Act to Clarify the Application of Water Quality Standards to Hydroelectric Projects" (the "Hydroelectric Project Act"), L.D. 2107, respectively.

While approving major portions of both statutes, we commented on several provisions which did not appear to be in conformance with the federal water quality regulations, 40 C.F.R. Part 131, promulgated pursuant to Section 303 of the Clean Water Act. The provisions in question were 38 M.R.S.A. §§ 464(4)(F)(1) and (5), 465, 467(1)(A)(2) and (7)(A)(3) in Section 15 of the Reclassification Act; and 38 M.R.S.A. §§ 363-C and 634 in Sections 1 and 2, respectively, of the Hydroelectric Projects Act. In our letter we requested further clarification of these provisions and an explanation of how the State intended to meet our concerns.

By letters dated September 5 and November 4, 1986, former Commissioner Kenneth Young responded to EPA's comments. Subsequently, on January 21, 1987, representatives of EPA met with members of the DEP to further discuss the issues raised by the provisions in question. In light of our discussions with the State, several issues regarding Sections 464(4)(F)(5), 465, and 634 have been resolved, provided that EPA receives written assurance that the State will be taking the necessary action regarding Sections 464(4)(F)(5) (nonpoint source control requirement) and 465 during the next standards revision (see Attachment A).

To date, however, the State has not adequately reconciled the remaining provisions with federal requirements or committed to take the action necessary to change the provisions to conform to the federal water quality regulations. Therefore, pursuant to

Section 303(c)(3) of the Clean Water Act, EPA is disapproving the following sections for federal water quality standard purposes:

38 M.R.S.A. §§ 464(4)(F)(1) (definition of "existing use"); and

38 M.R.S.A. § 363-C (reclassification of proposed hydroelectric impoundments to Class GP-A).

The basis for the disapproval and the changes needed to assure compliance with the requirements of the Act and the regulations promulgated thereunder are set forth in detail in Attachment A. You have the opportunity to revise the disapproved sections to conform to the requirements set forth in the Attachment within 90 days of your receipt of this letter. If such revisions are not made, it is EPA's obligation to publish proposed standards in the Federal Register as a preliminary step toward federal promulgation.

As noted in Attachment A, before taking formal approval or disapproval action on the following provisions, we are requiring further clarification on these provisions from the Maine Attorney General's Office within 30 days of receipt of this letter:

38 M.R.S.A. § 467(1)(A)(2) (classification of impoundments on Androscoggin River)

38 M.R.S.A. § 467(7)(A)(3) (classification of impoundments on Penobscot River)

If you have any questions, please have your staff contact David O. Lederer of the Water Management Division at (617) 565-3539 or Tonia D. Bandrowicz of the Office of Regional Counsel at (617) 565-3450.

Sincerely,

Michael R. Deland
Regional Administrator, Region I

cc: Steven W. Groves
Maine Department of Environmental Protection

Tim Glidden
Office of Policy and Analysis

James E. Tierney,
Maine Attorney General

Robert A. Moore, Esq.
Maine Office of the Governor

ATTACHMENT A

1. Hydroelectric Projects Act

a. Section 1 (38 M.R.S.A. § 363-C)

Section 363-C of the Hydroelectric Projects Act provides that:

> For the purposes of water quality classification the waters of a new or proposed hydroelectric impoundment shall be deemed to be Class GP-A if the commissioner finds that it is reasonably likely that the impoundment would: 1) Stratification. Thermally stratify; 2) Area. Exceed 30 acres in surface area; and 3) Discharge. Not have any upstream direct discharges, except for cooling water.

As we pointed out in our letter of August 20, 1986, to "deem" a water body a different classification than its current classification for water quality purposes is, in effect, a reclassification of that waterbody and, as such, is subject to the procedures on standards revisions contained in 40 C.F.R. § 131.20. Our review of Section 363-C reveals that it is inconsistent with the procedural requirements of Section 131.20 because it allows the State to change the classification of a waterbody without a public hearing, 40 C.F.R. § 131.20(b), and the approval of the Regional Administrator, 40 C.F.R. § 131.20(c).

The DEP indicated in its November 4, 1986 letter that the automatic reclassification mechanism of Section 363-C is necessary in order to simplify hydroelectric certification proceedings. However, to be in full conformance with federal requirements, it is necessary that all standards revisions be conducted on a case-by-case basis following the Section 131.20 procedures. This is to ensure that there is adequate opportunity for public participation as well as EPA review in the standards revision process.

Accordingly, EPA is disapproving 38 M.R.S.A. § 363-C. This provision must therefore be repealed or modified so as to be in accordance with federal requirements within 90 days or EPA shall initiate federal promulgation action pursuant to Section 303(c)(4) of the Clean Water Act (the "Act"), 33 U.S.C. § 1313(c)(4).

It is noted that in its discussions with EPA, the DEP expressed a concern that unless the classification of an existing river segment for which an impoundment is proposed can be changed to a classification which contains no dissolved oxygen criteria (i.e., GP-A), hydroelectric projects will be, in effect, precluded in Maine because the stratified impoundment which results from the construction of a dam will be unable to meet the dissolved oxygen criteria under the existing riverine classifications. Reclassification is not necessary, however. Rather the State may conduct a site specific study pursuant to 40 C.F.R.

§ 131.11(b)(1)(ii) to determine if the existing instream uses would be protected in the proposed impoundment with a dissolved oxygen level lower than that in the existing classification. If, based on the study, the State determines that the existing uses will be protected even though the current dissolved oxygen criterion would be violated, the State may then propose to modify the criterion for the segment in which the proposed impoundment will be located. Such a change must be justified by acceptable scientific procedures and be in accordance with proper procedures for standards modifications in 40 C.F.R. § 131.20, including public participation and EPA approval.

Regardless of the classification of any segment, any proposed hydroelectric project must be consistent with the federal antidegradation provisions at 40 C.F.R. § 131.12 and the State counterpart at 38 M.R.S.A. § 464(4)(F)(1), which are designed to ensure that existing uses and the level of water quality necessary to protect those uses are maintained and protected.[1]/ Thus, it must be demonstrated that the proposed impoundment will not lower water quality below the level necessary to protect the uses currently existing in the river segment, 40 C.F.R. § 131.12(a)(1).

Furthermore, if the water quality of the river segment currently exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water ("fishable/swimmable" waters), the antidegradation provisions also require a demonstration of important social and economic benefits to the construction of the dam in order to justify lowering the water quality, 40 C.F.R. § 131.12(a)(2) and 38 M.R.S.A. § 464(4)(F)(5).

b. Section 2 (38 M.R.S.A. § 634(1))

Section 634(1) which concerns the issuance of hydroelectric project permits provides that:

> the commissioner [of Environmental Protection] or director [of Maine Land Use Regulation Commission], shall issue or deny [a water quality certificate pursuant to Section 401 of the Act] based on the [Board of Environmental Protection's or the Maine Land Use Regulation Commission's] finding pursuant to [38 M.R.S.A.] Section 636, subsection 7, paragraph G [as to whether there is reasonable

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[1]/ In other words, even if site specific criteria are developed or the water segment was reclassified to a Class GP-A, the proposed project must be shown to be consistent with antidegradation provisions.

> assurance that the project will not violate applicable water quality standards] within 5 working days of the [permit] applicant's request or the issuance of a permit... If the commissioner or director fails to act on the certificate, the federal certificate requirement of...Section 401, shall be waived.

In our August 20th letter we informed the DEP that 5 working days was an unreasonably short period of time within which to issue or deny certification and therefore inconsistent with Section 401(a)(1) of the Act which states that the certification authority of the State will only be waived if the State fails to act within "a reasonable period of time, not to exceed one year."[2]/ EPA further commented that any waiver of certification authority must be in writing as required by 40 C.F.R. § 121.16 and cannot be made by default.

In its November 4th letter, the DEP stated that under the DEP's interpretation of Section 634(1), the Board of Environmental Protection ("Board") or the Maine Land Use Regulation Commission ("Commission") (in the organized and unorganized territories of the State, respectively), have 105 days after receiving a hydroelectric project permit application in which to make a determination of whether to issue such permit.[3]/

This determination is based on a number of factors, including whether there is reasonable assurance that the discharge from the proposed project will not result in a violation of applicable water quality standards. After the Board or Commission makes its determination on permit issuance, the Commissioner or Director has five working days within which to issue or deny Section 401 certification. According to the DEP, the issuance or denial of such certification by the Commissioner or Director is purely a ministerial function and is based on the finding of whether or not water quality standards will be violated already made by the Board or Commission pursuant to Section 636(7)(G). Since the actual determination of whether water quality standards will be met is made by the Board or Commission and those agencies have 60 days and 105 days, respectively, in which to make their finding, the DEP argues that the time period, in effect, meets the federal requirement of reasonableness.

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[2]/ 40 C.F.R. § 121.16, promulgated under Section 401 of the Act, provides that the reasonable period of time "shall generally be considered to be 6 months but in any event shall not exceed 1 year."

[3]/ While it is true that under 38 M.R.S.A. § 635-A the Commission has 105 days within which to make its decision, it is EPA's understanding that Section 635-A only provides the Board with 60 days.

In accordance with the DEP's interpretation, Section 634(1) provides that the certification decision will be based on the Board or Commission's water quality determination. It also states, however, that the Commissioner or Director shall issue or deny certification "within 5 working days of the applicant's request..." (emphasis added). This could be taken to mean that the certification decision is to be made prior to the Board's or Commission's determination on permit issuance and consequently their finding on whether the discharge will meet water quality standards. To correct any misinterpretation that might result from this language, the DEP has clarified the meaning of Section 634-C in the Administrative Regulations For Hydroelectric Projects adopted December 10, 1986 by providing that:

> The Commissioner or Director, as appropriate, shall act to issue or deny water quality certification within 5 working days following the decision by the Board or Commission to approve or disapprove a proposed project pursuant to 38 M.R.S.A. Section 636 (emphasis added).

In light of the DEP's clarification of the meaning of Section 635(1) in the regulations, EPA finds that this provision is consistent with federal requirements.

With respect to the issue of the written notification of the State's intention to waive its certification authority, the DEP in its November 4th response argued that, notwithstanding 40 C.F.R. § 121.16, federal law does not require written notification of the State's waiver but that the State would be requiring such notification through its rulemaking process. The regulations subsequently issued pursuant to 38 M.R.S.A. § 630, however, did not contain a written notification requirement and the DEP at the January 21st meeting stated that it would not be requiring such notification in writing.

Section 121.16 requires written notice to EPA of the State's waiver of certification in order that EPA may initiate its review under Section 401(a)(2) of the Act and Sections 121.13, 121.14, and 121.15 of the federal regulations. EPA is not disapproving the absence of the written notification provision in the State's regulations but wishes to make clear that the State's failure to provide such notification may potentially delay permit or license issuance.

2. Reclassification Act

a. Section 15 (38 M.R.S.A. § 464(4)(F)(1))

The term "existing instream water uses" is defined in Section 464(4)(F)(1) as "significant, well-established uses that have actually occurred on a water body on or after November 28, 1975"

(emphasis added). As noted in our August 20th letter, this definition is narrower than and therefore inconsistent with the federal definition at 40 C.F.R. § 131.3(e), i.e., "uses actually attained in the water body on or after November 28, 1975 whether or not they are included in the water quality standards."

By including the terms "significant" and "well-established" in its definition, Maine may be precluded from finding that a use exists in situations where the water quality is suitable to allow such a use to occur even though the use may not currently be occurring or has only been occurring for a short period of time. This would be inconsistent with the federal definition. Accordingly, EPA is disapproving the definition of "existing use" in Section 464(4)(F)(1).

In order to be consistent with the federal definition, the State must delete the phrase "significant, well-established" from its definition. In addition, to clarify that a use can be an existing use even though it is not a designated use, the State must also expressly provide that the use is existing whether or not it is included in the water quality standards. Unless such action is taken within 90 days, EPA shall, in accordance with federal requirements, initiate promulgation action.

b. Section 15 (38 M.S.R.A. § 464(4)(F)(5))

The State's antidegradation provision is contained in 38 M.R.S.A. § 464(4)(F). Subsection (5) of Section 464(4)(F) provides that:

> The board may only issue a discharge license pursuant to Section 414-A or approve water quality certification pursuant to the United States' Clean Water Act, Section 401, Public Law 92-500, as amended, which would result in lowering the existing quality of any water body after making a finding, following opportunity for public participation, that the action is necessary to achieve important economic or social benefits to the State and when the action is in conformance with subparagraph 3. That finding must be made following procedures established by rule of the board.

In accordance with 40 C.F.R. § 131.12(a)(2), this provision requires a finding of important economic and social development prior to the approval of a discharge which would result in a lowering of the water quality within a waterbody's classification; however, as we noted in our July 16th letter, this section does not expressly provide that the water quality cannot be lowered below the level necessary to fully protect existing uses, 40 C.F.R. § 131.12(a)(2).

In its September 5, 1986 letter, the DEP explained that this Section does not stand on its own and must be read in conjunction with Section 464(4)(F)(1) which does expressly require the full protection of existing uses. EPA finds the State's interpretation

of Section 464(4)(F) satisfactory, especially since it is supported by the Water Reclassification Report of the Joint Standing Committee on Energy and Natural Resources (March, 1986).[4]/

We also noted in our July letter that Section 464(4)(F)(5) does not contain a requirement that the State satisfy the "intergovernmental coordination" and "public participation" provisions of the State's continuing planning process ("CPP"), 40 C.F.R. § 131.12(a)(2). However, the DEP has informed EPA that public participation and authority for intergovernmental coordination are required by the draft Rules Relating to Antidegradation Policy and 38 M.R.S.A. § 366, respectively. EPA finds the federal requirements are therefore satisfied, provided that the draft antidegradation rules are adopted.

Finally, Section 464(4)(F)(5) does not contain a specific requirement that the State assure that there will be achieved "the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control," 40 C.F.R. § 131.12(a)(2). In its September 5th letter, the DEP explained that these requirements are covered by Secton 414-A of Title 38 of the M.R.S.A. That section provides that the Board of Environmental Protection shall issue a license for the discharge of any pollutant only if it finds among other things, that:

> The discharge will be subject to effluent limitations which require application of best practicable treatment. "Effluent limitations" means any restriction or prohibition including but not limited to effluent limitations, standards of performance for new sources, toxic effluent standards and other discharge criteria regulating rates, quantities and concentrations of physical, chemical, biological and other constituents which are discharged directly or indirectly into waters of the State. "Best practicable treatment" means the methods of reduction, treatment, control and handling of pollutants including process methods and the application of best conventional pollutant control technology or best available technology economically achievable, for a category or class of discharge sources which the board determines are best calculated to protect and improve the quality of the receiving water and which are consistent with the requirements of the Federal Water Pollution Control Act, as amended. In determining best practicable treatment for each such

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4/ See page 8: "In no instance may the [Board of Environmental Protection] approve a discharge which would cause water quality to be below the standard of the appropriate classification."

> category or class, the board shall consider the then existing state of technology, the effectiveness of the available alternatives for control of the type of discharge and the economic feasibility of such alternatives (emphasis added).

Because the State has interpreted this language to cover both point and non-point source control, EPA is not disapproving Section 464(4)(F)(5) at this time; however, EPA believes that the State's interpretation is vulnerable to a legal challenge and therefore expects the State to incorporate a specific requirement on non-point source control in either the statute or the rules and regulations promulgated under the statute during the next standards revision. The DEP should submit written assurance to EPA within 30 days of receipt of this letter that it will be recommending such a requirement to the legislature during the next standards revision.

c. Section 15 (38 M.S.R.A. § 465 (2)-(4) Protection of Salmonid Spawning)

In our July 16, 1986 letter, we noted that the dissolved oxygen criterion in Section 465 protective of salmonid spawning areas was provided for in Class A and Class B waters but not in Class C waters. The State's September 5, 1986 response indicated that the dissolved oxygen criterion for salmonid spawning was not included in the standards since the EPA national water quality criteria document, 51 FR 22978 (June 24, 1986), for dissolved oxygen was not final during legislative action on the bill. The DEP stated, however, that it would use EPA's dissolved oxygen criterion for the Maine standard in designated spawning areas in Class B and C waters. In light of these facts, EPA is not disapproving this section at this time; however, the DEP should submit written assurance to EPA within 30 days of receipt of this letter that it will be recommending adoption of the EPA national criterion to the legislature during the next standards revision.

d. Section 15 (38 M.R.S.A. § 465 Chronic Criterion for Dissolved Oxygen)

EPA's July 16, 1986 letter pointed out that the Maine instantaneous dissolved oxygen criterion in Section 465 might not provide full protection in light of the final national criterion document, 51 FR 22978 (June 24, 1986), which recommends that a chronic criterion be utilized in addition to an instantaneous minimum.

The State's September 5, 1986 response indicated that the standards only contain an instantaneous minimum criterion since the national criteria document for dissolved oxygen was not final at the time of legislative action. The DEP further stated that the instantaneous minimum criterion listed in the standards would yield averages similar to those in the national criteria document and that the instantaneous minimum would be easier to monitor, enforce, and model. Nevertheless, EPA believes that chronic criteria for

dissolved oxygen are needed in water quality standards. This is particularly true for the many flow regulated streams in Maine where nearly steady-state low flows during long periods of summer-time conditions may cause chronic impacts on fisheries.

Since the national document was not finalized until after legislative action on the bill, EPA is not disapproving this section at this time; however, the DEP should submit written assurance to EPA within 30 days of its receipt of this letter that it will be recommending adoption of EPA's chronic criterion for dissolved oxygen to the legislature during the next standards revision.

e. Section 15 (38 M.R.S.A. §§ 467(1)(A)(2) and (7)(A)(3)

In Sections 467(1)(A)(2) and (7)(A)(3), the Maine legislature recognizes that at certain times the impoundments on the Androscoggin and Penobscot Rivers, respectively, have not and may not continue to meet the Class C requirements for aquatic life and dissolved oxygen due to conditions existing in the impoundments. The legislature further recognizes that these impoundments constitute a valuable indigenous and renewable energy resource for hydroelectric energy. The legislature concludes by stating that:

> the value and importance to the people of the state of hydroelectric energy and the unavoidable consequences to water quality resulting from the existence of these impoundments shall be considered when the board determines the impact of a discharge on designated uses of impoundments... These impoundments shall be considered to meet their classification if the department finds that conditions in those impoundments are not preventing their designated uses from being reasonably attained.

As pointed out in our August 20th letter, the federal regulations require the full protection (not "reasonable" attainment) of a classification's designated uses. Accordingly, if it was the legislature's intent to provide for something less than the full protection of uses and to permit the violation of the Class C criteria in these impoundments, this language is inconsistent with federal requirements and must be disapproved.

The DEP has indicated, however, that the provisions in question merely state the intent of the legislature to create subcategories of the existing classification's uses and assign criteria specific to these impoundments pursuant to 40 C.F.R. § 131.10 after the State conducts the necessary studies and follows the proper procedures for such a subcategorization. (see, September 5, 1986 letter)[5]/ Thus, the State notes in its letter that a UAA

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[5]/ As we pointed out in our July 16th letter, under 40 C.F.R. § 131.10(g), the State may adopt subcategories of an existing classification's uses after showing through a use attainability

Footnote continued on next page.

is currently being conducted for the impoundments on the Androscoggin River and that once the study is completed, hearings will be held and criteria selected and legislated.

Completion of the study, however, has been delayed several times. In addition, no study is being performed or planned for the impoundments on the Penobscot River. Since the UAAs are not completed, the State's attempt at subcategorizing these impoundments is not yet effectuated. Therefore, until a change in criteria is developed and justified by a UAA and the Section 131.20 standards revision procedures followed, the language in Sections 467(1)(A)(2) and (7)(A)(3) has no effect on the classification of the impoundments which, under Sections 467(1)(A)(1) and (7)(A)(2), are Class C.[6]/

Inasmuch as the legislative intent of Sections 467(1)(A)(2) and (7)(A)(3) is consistent with EPA's interpretation as outlined above, the provisions are approved. If, however, the intent of the provisions is to permit the violation of existing criteria prior to a proper subcategorization under Section 131.10(g) (or the development of site specific criteria under Section 131.11(b)(1)(ii)), these sections must be disapproved. The State should therefore submit a written statement to EPA within 30 days of its receipt of this letter from the Maine Attorney General's Office on their interpretation of these sections.

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[5] con't/

analysis ("UAA") that the attainment of the designated uses is not feasible because of one or more of the reasons set forth in subsections (1) through (6) of Section 131.10(g) and following the procedures for a standards revision under 40 C.F.R. § 131.20.

The DEP was also informed at the January 21st meeting that it could, in the alternative, develop site specific criteria for these impoundments if, after conducting a study based on acceptable scientific procedures, the State determined that the existing uses will be protected even though specific criteria may be violated (see, 40 C.F.R. § 131.11(b)(1)(ii)).

[6]/ The State's water quality standards, in addition to establishing the water quality goals for specific waterbodies, also serve as the regulatory basis for the establishment of water quality-based treatment controls. Since the UAAs have not been completed and different criteria established for these impoundments, EPA will continue to write permits for the upstream dischargers based on Class C criteria.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

August 31, 1987

Dean C. Marriott
Commissioner
Maine Department of Environmental Protection
State House Station # 17
Augusta, Maine 04333

Dear Commissioner Marriott:

Thank you for your July 16, 1987 letter outlining the plans the Maine Department of Environmental Protection (DEP) has to correct the deficiencies in state law which necessitated EPA's May 21, 1987 disapproval of certain sections of Maine's water quality standards.

I felt our recent discussion on this matter was helpful and I am delighted that the DEP plans to work with EPA, the Legislature, and the Governor's Office to develop the changes necessary to comply fully with the federal statutes and regulations.

We encourage your efforts to substitute measurement criteria for the adjectives "significant and well-established" in L.D. 2283 to clarify the procedure by which existing uses will be established in the standards implementation process.

In response to your letter, we request the following information and/or clarification of DEP's planned future course of action:

1. Your letter stated your intention to "...comply fully with the public notice and EPA review criteria while preserving the coordination intent of the Maine Waterway Development and Conservation Act." It is unclear how the procedural scheme outlined for dam certification under L.D. 2107 can be altered to comply with the public notice and EPA review requirements short of the repeal of these sections. Therefore, we request clarification of what specific proposals the DEP intends to make to the Legislature on this issue. In addition, we request that DEP inform us of the number and locations of potential projects which could be affected by L.D. 2107.

2. With regard to the Androscoggin and Penobscot River classifications, we request that the DEP submit a detailed schedule for the preliminary decision making steps regarding the future classification of the segments (i.e., public hearings).

In addition, there are a number of issues contained in our May 21, 1987 disapproval letter on which we still require specific confirmation:

1. Written assurance from DEP that it will recommend the required changes to the non-point source control language contained in the L.D. 2283 during the next standards revision.

2. Written confirmation that DEP will recommend adoption of the national dissolved oxygen criteria for salmonid spawning, in accordance with the national criteria document, 51 FR 22978, June 24, 1986 to the Legislature when the standards are next revised.

3. Written confirmation that the DEP will recommend adoption of a chronic dissolved oxygen criterion in accordance with the national criteria document, 51 FR 22978, June 24, 1986, to the Legislature during the next standards revision.

We must begin the process of preparing a promulgation package for publication in the federal register due to the framework set forth in our regulations at 40 C.F.R. §131.22. Publication of the proposed rules should coincide with the next state Legislative session's efforts to address correction of the disapproved standards provisions.

I thank you for your continued cooperation and trust that by working together we can reach a mutually acceptable solution to the issues outlined above.

Sincerely yours,

Michael R. Deland
Regional Admistrator

You were good to come to Boston to meet on these & other issues. I hope we can coordinate calendars with the Governor so we can meet in Maine before the snow flies!

cc: David Sabock, EPA Headquarters
Steven Groves, Maine DEP
Tim Glidden, Office of Policy and Analysis
James E. Tierney, Maine Attorney General
Ron Kriesman, Esq, Natural Resources Council of Maine
Lee C. Shroer, Esq., EPA Headquarters
Robert Moore, Esq, Office of the Governor

Exhibit 6 11/23/88

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

November 3, 1988

Stephen W. Groves, Director
Bureau of Water Quality Control
State of Maine
Department of Environmental Protection
State House Station 17
Augusta, Maine 04333

Re: Proposed Changes to 38 M.R.S.A. §§ 363-C and 464(4)(F)(1) and Related Matters

Dear Mr. Groves:

By letter dated May 21, 1987, the Environmental Protection Agency ("EPA") disapproved, pursuant to Section 303 of the Clean Water Act, 33 U.S.C. § 1313, and the regulations promulgated thereunder at 40 C.F.R. Part 131, the following sections of the Maine's Water Quality Standards:

38 M.R.S.A. § 464(F)(1) (Definition of "existing use"); and

38 M.R.S.A. § 363-C (Reclassification of proposed hydroelectric impoundments to Class GP-A).

In our May 21st letter, we also requested that the DEP provide written assurance that it would make other specified changes to 38 M.R.S.A. §§ 464(4)(F)(5) and 465(2)-(4) during its next water quality review and provide an interpretation of 38 M.R.S.A. § 467(1)(A)(2) and 467(7)(A)(3) from the Maine Attorney General's Office.

On November 25, 1987, the Maine Department of Environmental Protection ("DEP") sent EPA proposed changes to 38 M.R.S.A. §§ 363-C and 464(4)(F)(1). Consistent with the informal comments provided to the DEP on April 10, 1988, EPA's position with respect to these proposed changes is set forth below. Maine has also recently proposed regulations which implement certain provisions of the Maine Water Quality Standards. Chapter 587 of these regulations directly relates to the definition of existing use proposed by the State in Section 464(4)(F)(1). We have therefore included comments on this regulation as well.

1. Section 464(F)(1) (Definition of "Existing Use"):

The definition of "existing use" in the proposed revision to Section 464(F)(1) is missing certain key language which is in the federal definition of that term at 40 C.F.R. § 131.3(e).

Specifically, the federal index date of "November 28, 1975"--which is in Maine's current version of Section 464(F)(1)--is omitted in the proposed revision. This date or, if preferred, an earlier date, must be included in the State's definition of "existing use." In addition, the proposed definition does not provide that uses are existing "whether or not they are included in the water quality standards." Such language must be added to the State's definition so it is clear that a use may be existing even though it is not a designated use under Maine's Water Quality Standards.

The proposed revision also includes language which is inconsistent with the federal antidegradation policy. Specifically, the revision states that "factual determinations of what constitutes an existing in-stream water use on a particular water body and the extent of allowable impact on the existing use shall be made on a case-by-case basis..." (Emphasis added). The phrase "and the extent of allowable impact on the existing use" must be deleted since it indicates that existing uses will not be fully maintained and protected as required by federal law. Unless the changes noted above are made, the statutory provision will not be approvable.

In the proposed definition of "existing use," Maine has also listed specific criteria for the State to examine in making case-by-case determinations of "what constitutes an existing in-stream water use on a particular water body." The recently proposed regulations in Chapter 587.1 of the Bureau of Water Quality Control Regulations expands on the criteria the Board will examine. In general, this approach of including the criteria the State will examine in determining whether a use is "existing" in the State's definition of "existing use," is acceptable to EPA. It is not clear, however, if, based on the specific criteria the State has chosen, all the uses that would be considered "existing" under the federal definition would also be considered "existing" under the State's definition.

In particular, since the criteria listed in both the proposed statutory provision and the regulation emphasize the length and number of times a use has occurred, EPA is concerned that the State could determine that a particular use was not "existing" because such a use was not currently occurring or documented as occurring even though the water quality was suitable to allow such a use to occur. For example, the State might improperly determine that "shellfishing" is not an existing use in an area where shellfish are propagating and surviving and are suitable for harvesting simply because the shellfish are not currently being harvested. See, EPA's "Questions and Answers on Antidegradation," dated August, 1985. Therefore, although EPA would not disapprove Section 464(F)(1) as proposed, we do recommend that Maine add language to either the statute or the

regulations that would make it clear that the State will take into account whether the existing water quality is suitable to allow certain uses to occur even though they may not be currently occurring.

Furthermore, the criteria the State has chosen to include in Chapter 587.1 relate primarily to "human uses" such as boating, swimming, fishing, etc. Since Maine's Water Quality Standards specifically designate "habitat for fish and other aquatic life" as a use, EPA also recommends that additional criteria be developed which relate to the "aquatic life use." This could include reports or testimony which document the species of fish in a particular waterbody, or habitat suitability information confirming that certain aquatic uses could occur in a waterbody in the absence of testimony.

The proposed regulations in Chapter 587 also raise a question regarding the State's antidegradation policy. Under the federal anti-degradation policy, any proposed discharge which would cause a lowering of water quality requires a demonstration of "important economic and social benefits." 40 C.F.R. § 131.12(a)(2). EPA's currect view is that, if a discharge will not "significantly" lower water quality, the antidegradation requirements will be met and a detailed economic and social benefit analysis need not be performed. Since there is no EPA national guidance identifying a single acceptable method for determining whether a discharge is significant, the Region has proposed that the definition of "significant" be left up to the states, subject to EPA approval.

Under the proposed Chapter 587.5.B., Maine has chosen to operate "under the rebuttable presumption that 'lowering of the existing quality of any water body' will occur when a proposed discharge or activity consumes greater than 20% of the remaining assimilative capacity allowed in the appropriate class." Thus, all discharges below the 20% cutoff would automatically be determined to be "insignificant." Such an approach could have results which are contrary to the federal antidegradation policy since repeated or small discharges below the 20% cutoff could result in significant water quality degradation without a demonstration of economic and social benefit. For this reason the Region finds that the proposed regulation, as drafted, may not be approvable without changes.

Until national policy on this issue is established, the Region would find this provision acceptable if it is redrafted in the following manner: First, the regulation should be changed so that all discharges greater than 20% of the remaining assimilative capacity would be automatically deemed "significant."

Second, the regulation should provide that all discharges less than the 20% cutoff will be subject to a case-by-case review by the State to determine whether or not the discharge is significant. In examining each discharge on a case-by-case basis, the State will consider certain listed criteria such as the degree of degradation that has been permitted previously, the sensitivity of the particular water body, etc.

Finally, the regulation should state that notice of the State finding of significance or insignificance and an opportunity to comment on such finding will be included in the public notice of the permit proposed to be issued to the discharger.

2. 38 M.R.S.A. § 363-C (Reclassification of Proposed Hydroelectric Impoundments

The proposed provisions on state certification and dam licensing are acceptable but the State must clarify Section 635-B(1)(C) so that it is understood that it is the change in the characteristics of the waterbody both upstream and downstream resulting from the proposed dam that must not violate Section 464(4)(F).

3. Other Issues

To date EPA has not received written assurances that the State will incorporate specific requirements on nonpoint source control in 38 M.R.S.A. § 464(4)(F)(5) or include dissolved oxygen criteria protective of salmonid spawning in 38 M.R.S.A. § 465(2)-(4) as required by EPA's May 21, 1988 letter referred to above. These written assurances should be submitted to the agency as soon as possible.

In addition, EPA has not received an interpretation of 38 M.R.S.A. § 467(1)(A)(2) and 467(1)(A)(3) from the Maine Attorney General's Office. The Region recognizes that the State has been following the interpretation put forth by EPA in its May 6th letter regarding these two provisions. However, until this interpretation is confirmed by the Attorney General, the provision is subject to alternative interpretations in the future which may not be consistent with federal requirements. For this reason, the State must either remove the language in question from the statute or submit a formal Attorney General's Statement which indicates that it is being read consistently with federal requirements.

Please feel free to call Eric Hall of my staff or Tonia D. Bandrowicz or Jonathan Kaledin of the Office of Regional Counsel if you have any questions regarding this matter. Mr. Hall can be reached at (617) 565-3533. Mr. Kaledin can be reached at (617) 565-3334. Ms. Bandrowicz will be on detail to EPA's Washington D.C. Office until February, 1989 but can be reached at (202) 475-8180.

Sincerely,

David A. Fierra, Director
Water Management Division

cc: Ron Kriesman, Natural Resources Council, Maine
David K. Sabock, WH-585
Jonathan Kaledin, RRC-2203

Exhibit 7

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

May 11, 1989

Philip F. Aherns
Deputy Attorney General
Department of Attorney General
State House, Station 6
Augusta, ME 04333

Re: 38 MRSA 467(1)(A)(2) and 467(7)(A)(3)

Dear Chip:

It is our understanding that the Maine Department of Environmental Protection ("DEP"), at the request of the U.S. EPA, has asked your office for an interpretation of 38 MRSA 467(1)(A)(2) and 467(7)(A)(3). I am writing to find out the outcome of your review of this legislation, specifically, as to whether you agree with EPA's interpretation as set forth in our May 21, 1987 letter to the Maine DEP (attached).

I would appreciate if you could provide us with a response in the near future because, if EPA's interpretation in not valid and a statutory change is necessary, it is our understanding that the state legislature will only be in session until the end of June.

Thank you for your assistance in this matter.

Sincerely,

Tonia D. Bandrowicz
Assistant General Counsel

cc: John Edwards, ME AG
Steve Groves, ME DEP
Tim Glidden, Policy Office
Bill Diamond/Dave Sabock, OWRS
Ron Manfredonia/Eric Hall, Region I

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

Exhibit 8

December 20, 1990

Dean Marriott, Commissioner
Department of Environmental Protection
State House Station 17
Augusta, ME 04333

Dear Commissioner Marriott:

The Environmental Protection Agency has completed its review of several pieces of legislation and regulation revising and adding to the Maine water quality standards program. Also considered in this review is a letter from the Maine Attorney General containing a critical interpretation of "reasonable attainment" of water uses. The specific documents reviewed are:

Regulations

Chapter 580 - Procedures for sampling and analysis

Chapter 581 - Assimilative capacity of streams and ponds, stream minimum flows, zone of passage, and trophic state of great ponds

Chapter 582 - Temperature

Chapter 584 - Numeric criteria, Option 1

Chapter 585 - Identification and designation of spawning areas in Class B and C waters

Chapter 586 - Discharge restrictions in Class A waters

1989 Legislation

Repeal of 38 MRSA §363-C; Automatic reclassification

Enactment of 38 MRSA §464, sub-§4,¶ F; Antidegradation

Repeal and amendment of 38 MRSA §634, sub-§1; 38 MRSA §635 -B; 38 MRSA §636, sub-§7, ¶ A,E and F. Repeal of 38 MRSA §636, sub-§7, ¶ G. Enactment of 38 MRSA §363, sub-§8. All dealing with water quality certification of hydroelectric projects.

1990 Legislation

Amendment of 38 MRSA §464, sub-§4, ¶ F; Antidegradation

Amendment of 38 MRSA §467; Reclassification of several basins: Androscoggin River, Dennys River, East Machias River, Machias River, Mousam River, Narraguagus River, Penobscot River, Pleasant River, Presumpscot River, Royal River, Saco River, St. Croix River, St. George River, St. John River, Salmon Falls River, Union River, Kennebec River and Maine Coastal Basins.

Enactment of 38 MRSA §414-C and §466, sub-§§2-A and 9-C; Color pollution control

Amendment of 38 MRSA §467, sub-§15, ¶ C; An act preventing the Board of Environmental Protection from considering the impact on water quality of the Squa Pan hydroelectric project.

Amendment of 38 MRSA §414-A, sub-§2; Permit schedules of compliance.

Enactment of 38 MRSA §420, sub-§2, ¶¶ A to G; Adoption of numeric criteria, Option 1, through legislation.

Interpretation

A letter from the Maine Department of the Attorney General interpreting 38 MRSA §467(1)(A)(2) and (7)(A)(3) indicating that "reasonable attainment" means full compliance with Maine law and regulation.

Pursuant to sections 303 (c)(1) and 303 (c)(2)(B), I am approving your submittals with one exception, the 1990 amendment of 38 MRSA §467, sub-§15, ¶ C, "An Act Regarding Squa Pan Stream." Under separate cover, I am sending formal notification of EPA disapproval of the Squa Pan legislation.

With this approval of your classifications, numeric criteria adoption, antidegradation policy, and proper interpretation of attainment of designated uses, the State of Maine is in compliance with the federal regulations, 40 CFR 131, governing water quality standards.

My staff and I look forward to continued cooperation with DEP and to better coordination with the Maine Legislature in the areas of standards development and implementation. We are prepared to offer assistance in the drafting and review of companion policy and guidance documents at your convenience. If you have any questions, please call me or have your staff call Eric Hall at (617) 565-3533.

Sincerely,

Julie Belaga
Regional Administrator

cc: David K. Sabock, EPA, WH-585
Lee Schroer, EPA, LE-132W
Dave Courtemanche, ME DEP
Tim Glidden, Office of Policy & Analysis, ME Legislature

Exhibit 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

March 25, 1993

Dean Marriott, Commissioner
Maine Department of
Environmental Protection
State House
Station 17
Augusta, ME 04333

Re: EPA CWA Section 303 Approval of Change to
Ripogenus Impoundment Water Quality Standard

Dear Commissioner Marriott:

I am responding to the State's February 8, 1993 and October 26, 1992 letters proposing a downgrade in Maine's water quality standard for the Ripogenus Impoundment on the West Branch of the Penobscot River. Based on the information supplied by the Maine Department of Environmental Protection (DEP), including the use attainability analysis (UAA) prepared with assistance from Bowater/Great Northern Company and the public comment on that UAA, and for the reasons set forth below, we approve the State's proposed change in the criteria for the "habitat and aquatic life" use for this water body, to that contained in Part A of P.L. 1992, Chap. 813.

According to the October 26 letter, the proposed change is based on 40 C.F.R. §131.10(g)(4). This subsection provides for the removal of, or establishment of a subcategory of, a designated use, if the State demonstrates that:

> dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that will result in the attainment of the use.

The October 26 letter further states that environmental studies conducted by Bowater/Great Northern Company, support the conclusion that it is not feasible to operate the company's hydropower project in such a way that the Ripogenus impoundment would meet the current "natural" criteria for the aquatic life use for this water body. For clarification, the ability of the impoundment to meet the Class A/GPA "natural" criteria is not at issue in this reclassification. Rather, the question is whether the UAA demonstrates that the Ripogenus Project precludes the attainment of the criteria in the Class C habitat and aquatic life use, and it is not feasible to operate the dam in a way that

will result in the attainment of that use.[1]

We recognize that currently there is no national EPA guidance on the interpretation of 40 C.F.R. §131.10(g)(4), in particular guidance on when it is "feasible" to modify the operation of a dam so that standards will be met. We understand that EPA will be developing such guidance to deal with the difficult and unique issues faced in reconciling water quality issues where hydrological modifications predate state water quality standards. In the absence of such guidance, the Region, in consultation with EPA Headquarters, has taken a reasoned approach in interpreting subsection 131.10(g)(4). Thus, the Region has considered the practical and environmental implications of modifying the operation of the dam, as well as the technical and economic feasibility of doing so.

In the situation involving the Ripogenus Impoundment, we are willing to accept the State's finding, based on the UAA documentation and public comment, that it is not feasible to operate the dam in a way that would maintain the Class C habitat and aquatic life criteria, in part because the aquatic community that has evolved in the impoundment and downstream waters constitute an important fishery resource that would be at risk should the project's operation be significantly altered. In making our decision, we acknowledge that the company has, as part of the FERC mandated environmental review, made some concessions by agreeing to adjust its operation of the dam to further protect the downstream fishery and to remediate the dry reach in the upper gorge. While not used as a basis by the State,

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[1] As we stated in our February 4, 1992 letter, EPA recognizes that the requirement to meet the "natural" Class A/GPA or "unimpaired" Class B habitat and aquatic life use may not necessarily be appropriate for all situations involving existing impoundments. We therefore accepted the language in Part B of P.L. 1992, Chap. 813, which provides that the habitat and aquatic life uses would be met for certain Class A and GPA existing hydropower impoundments if those waters could support the criteria in the lowest classification, that is, Class C. As a result, under the current classification, the Ripogenus impoundment does not have to meet the "natural" criteria for the habitat and aquatic use; rather it must, achieve the Class C criteria which requires that the impoundment support "all species of fish indigenous to those waters and maintain the structure and function of the resident biological community, provided that some changes to aquatic life may occur due to the hydrologic modifications of the impoundments." It has consistently been the Region's position that in order to go below the Class C criteria for the habitat and aquatic life use, as is proposed for the Ripogenus impoundment, the federal procedures requiring a UAA and public participation must be satisfied.

there is also evidence in the record suggesting widespread adverse economic and social impact in the project area should major operational changes be required.

We wish to point out that the UAA prepared in this case, although acceptable under the unique circumstances presented by the Ripogenus impoundment (i.e., the valuable fishery that results from the current operation of the dam), it may not be satisfactory under other circumstances. In those more common cases where there is no clear environmental benefit resulting from continuing the current operation of the dam, the burden to support the status quo would be higher.

Although not a factor affecting our approval of the State's proposed downgrade in this specific case, we find that there were several comments made by the environmental groups during the public participation portion of the UAA process that raise issues which should be addressed in either the CWA section 401 proceeding or FERC relicensing. For example, recent information regarding tissue mercury concentrations in fish and bald eagles should be considered in the ongoing environmental review of the Ripogenus and other Maine hydropower relicensing activities. We suggest the CWA section 401 review and FERC environmental assessment evaluate the role of the impoundment's operation on the mobilization of mercury through the food chain. Should linkage between impoundment management and tissue toxicant levels be established, appropriate license conditions should be included or added.

We believe that today's approval of the Ripogenus Impoundment water quality standard downgrade demonstrates that the UAA and public participation process can work and provides support for the State to take action to address EPA objections to Part A of P.L. 1992, Chap. 813. We are concerned that this legislation may be used to avoid the UAA and public participation downgrading requirements in other FERC relicensing cases in Maine in the future.

As you know, EPA issued a CWA section 303(c)(3) letter to the State disapproving the standards change made by Part A of this legislation. It is our understanding that the State intends to draft and submit new legislation amending the water quality standards this session so as to correct the problems identified in our disapproval letter. Such standards amendments must be presented this session, or, in accordance with the CWA, EPA will be required to begin the process of promulgating a federal standard. As we have stated previously, we believe that as part of the amendments, Maine should incorporate UAA and public participation requirements comparable to those in the federal regulations directly in the state law, as other states have done. The amendments to the water quality standards should also include necessary reclassification of the Ripogenus Impoundment,

specifying the new lower criteria for that water body. We urge the State to involve EPA at the earliest possible date and forward a copy of the draft legislation when it is ready to EPA for review and comment.

As always, my staff and I are willing to meet with the State and other interested parties to try to resolve the inconsistencies between State standards and federal requirements. Please call me, or have your staff contact Eric Hall of the Water Management Division or Tonia Bandrowicz of the Office of Regional Counsel at (617) 565-3533 and (617) 565-3316, respectively.

Sincerely,

Paul Keough

Paul G. Keough
Acting Regional Administrator

cc: Steven W. Groves, ME DEP
Tim Glidden, ME OPA
Jon Edwards, ME AG
William Diamond/Dave Sabock, EPA OST
Lee C. Schroer/Carol Ann Sicilano, EPA OGC
Brian Stetson, Bowater
Dan Boxer, Esq.
Dean Beaupain, Esq.
Dan Sosland, CLF
Eric Hall, EPA-I
Tonia Bandrowicz, EPA-I
Michael Ochs, EPA-I

Exhibit 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

APR 12 93

Dean C. Marriott, Commissioner
Bureau of Water Quality Control
Department of Environmental Protection
State House Station 17
Augusta, ME 04333

Re: L.D. 1019, "An Act to Establish a Monthly Average Dissolved Oxygen Standard for Class C Waters."

Dear Mr. Marriott:

We have reviewed L. D. 1019 dealing with amendments to the dissolved oxygen criterion for Class C waters. The language in 38 MRSA §465, sub-§4, ¶B is proposed to be modified to include a requirement for the protection of adult salmonids of "a dissolved oxygen content of no more [sic] than 5.5 parts per million." Currently, the Class C criterion in Maine is 5.0 parts per million (ppm) or 60% of saturation, whichever is higher. The 5.0 pm is to be achieved at all river flows equal to or greater than the seven day mean low flow with a recurrence of one-in-ten years [38 MRSA 464 (4)(D)]. This value is also known as the 7Q10 flow.

The current Maine minimum is consistent with the EPA minimum criterion for dissolved oxygen found in "Ambient Water Quality Criteria for Dissolved Oxygen," April 1986 (EPA 440/5-86-003.) The EPA criteria document states that a minimum seven day mean dissolved oxygen value of 5.0 is to be met at the 7Q10 flow in order to protect the "other life stages" of the salmonids. The EPA criteria document goes on to say that a value of 6.5 ppm dissolved oxygen as a 30-day average is necessary to protect the other life stages. This indicates that while low dissolved oxygen values (5.0 ppm) can be withstood for short periods of time (seven days), to insure the long term survival of the adult salmonids, a higher long-term dissolved oxygen concentration is required. The EPA 30-day average dissolved oxygen criterion of 6.5 ppm is to be met at flows at and above a 30-day low flow with a recurrence of one-in-ten years (30Q10.) In some unregulated streams, a single short term minimum criterion will grant both the necessary short and long term aquatic life protection due to natural stream flow fluctuations above the 7Q10. However in many unregulated streams and virtually all regulated streams, both short-term and long-term average criteria are necessary in order to afford adequate protection of the adult salmonids.

The long-term average dissolved criterion of 5.5 ppm suggested in L.D. 1019 is insufficient to protect the designated uses assigned by the Legislature to Class C waters. The value of 5.5 ppm is in fact equal to EPA's long-term protection for the less sensitive warmwater fish. Class C waters have been designated as having

the quality necessary to protect all indigenous fish. Maine law at 38 MRSA 466 (8) defines indigenous as "supported in a reach of water or known to have been supported according to historical records compiled by the State and Federal agencies or published scientific literature." Salmonids are native to most all waters of Maine. The Maine Department of Inland Fisheries and Wildlife (DIFW) is responsible for the determination of where salmonids are not indigenous. Where DIFW has determined after a scientific evaluation that a waterbody can only support a warmwater fishery, Maine may use lower dissolved oxygen criteria. To date EPA Region I has received no such showing by either DIFW or DEP that any waterbody or segment of a water body should be placed into this lower protection category. In fact, the Maine DEP insists on the use of salmonids exclusively as the vertebrate toxicity test organism for all fresh water discharges.

In summary, the 5.5 ppm dissolved oxygen 30-day average criterion proposed in L.D. 1019 is not adequate to protect the designated uses of Maine Class C waters and cannot be approved by EPA. In order to provide for the protection and propagation of salmonids, Maine must use a 30-day average of 6.5 ppm or higher. If you have any questions regarding this matter, please contact me at (617) 565-3531 or Eric Hall of my staff at (617) 565-3533.

Sincerely,

Ronald C. Manfredonia, Chief
Water Quality Branch

cc: Tim Glidden, OPLA
Gordon Becket, USF&WS
David Sabock, EPA HQ
Tonia Bandrowicz, ORC

Exhibit 11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203-0001

OPTIONAL FORM 99 (7-90) 11/12/02

FAX TRANSMITTAL | # of pages ▸ 1

To Dave Courtemanch	From Jennie Bridge
Dept./Agency ME DEP	Phone # 617-918-1685
Fax # 207-287-7191	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

June 28, 1999

Dennis A. Purington, Acting Director
Bureau of Land & Water Quality
ME Dept. of Environmental Protection
State House, Station 17
Augusta, ME 04333-0017

Dear Mr. Purington:

This letter is to acknowledge your June 21, 1999 submittal of a "complete and current" effective water quality standards (WQS) package for inclusion in the Clean Water Act WQS docket for Maine. As you are aware, the Water Quality Standards (WQS) docket is necessary to support the WQS program after EPA revises its WQS rule in response to the Alaska court ruling (Alaska Clean Water Alliance v. Clark, No. C96-1762, July 8, 1997). In conjunction with the rule making process, EPA will offer the public an opportunity to review the WQS docket. We will contact you if the public review or further review by EPA identifies any omissions or erroneous inclusions that may need to be corrected.

Thank you for your assistance in creating the WQS docket. Please contact me (617/918-1501) or Bill Beckwith of my staff (617/918-1544) if you have any questions.

Sincerely,

Linda Murphy, Director
Office of Ecosystem Protection

cc: Fred Leutner, EPA SASD
Ronald Poltak, NEIWPCC

Water Quality Criteria Bibliography (Maine).
Bureau of Land and Water Quality
Maine Department of Environmental Protection
June 16, 1999. CORRECTED COPY: 6/30/99

Name/Title	Citation	Date of last amendment	Number of Pages
Statutory Sections			
Definitions	38 MRSA 361-A	July 9, 1998	2
Waiver or modification of protection and improvement laws	38 MRSA 363-D	July 14, 1994	1
Definitions	38 MRSA 410-H	Oct. 9, 1991	1
Program implementation	38 MRSA 410-J	June 30, 1992	1
Waste discharge licenses	38 MRSA 413	July 9, 1998	3
Conditions of licenses	38 MRSA 414-A	July 9, 1998	5
Publicly owned treatment works	38 MRSA 414-B	July 9, 1998	1
Color pollution control	38 MRSA 414-C	Sept. 19, 1997	2
Certain deposits and discharges prohibited	38 MRSA 417	July 14, 1990	1
Log driving and storage	38 MRSA 418	July 9, 1998	1
Protection of the lower Penobscot River	38 MRSA 418-A	July 13, 1982	1
Prohibition on the use of tributyltin as an antifouling agent	38 MRSA 419-A	March 29, 1993	2
Certain deposits and discharges prohibited	38 MRSA 420*	June 11, 1999	5
Discharge of waste from watercraft	38 MRSA 423	June 30, 1989	1
Discharge of waste from motor vehicles	38 MRSA 423-A	Sept. 29, 1987	1
Enforcement	38 MRSA 451	July 9, 1998	1
Time schedule variances	38 MRSA 451-A	Oct. 13, 1993	3
Classification of Maine waters	38 MRSA 464	July 9, 1998	11
Standards for classification of fresh surface waters	38 MRSA 465**	July 14, 1990	2
Standards for classification of lakes and ponds	38 MRSA 465-A**	July 14, 1990	1
Standards for classification estuarine and marine waters	38 MRSA 465-B	July 14, 1990	2
Definitions	38 MRSA 466	July 14, 1990	2
Classification of major river basins	38 MRSA 467***	July 14, 1994	15
Classification of minor drainages	38 MRSA 468***	June 30, 1992	4
Classification of marine waters	38 MRSA 469***	June 24, 1991	7
Approval criteria	38 MRSA 636	Sept. 29, 1995	2
* As amended by "An Act to Amend the Water Quality Laws to Establish a New Standard for Mercury Discharges"	PI 1999, ch. 500	June 11, 1999	5
**Amended by "An Act to Amend Certain Laws Administered by the Department of Environmental Protection, Bureau of Land and Water Quality"	PL 1999, ch. 243	September 18, 1999	9
***Amended by "An Act to Reclassify Certain Waters of the State"	PL 1999, ch. 277	September 18, 1999	15
Rule Chapters			
Administrative Regulations for Hydropower Projects	06-096 CMR 450 and 04-061 CMR 11	May 4, 1996	13
Regulations Concerning the Use of Aquatic Pesticides	06-096 CMR 514	May 4, 1996	1
Environmental Regulation: Surface Waters Toxics Control Program	06-096 530.5	Aug. 13, 1997	13
Discontinuance of Wastewater Treatment Lagoons	06-096 CMR 550	May 4, 1996	2

Stormwater and Combined Sewer Overflows	06-096 CMR 570	May 4, 1996	1
Snow Dumps: Exemption from Waste Discharge License	06-096 CMR 573	May 4, 1996	2
Regulations Relating to Water Quality Evaluations	06-096 CMR 581	May 4 ,1996	2
Regulations Relating to Temperature	06-096 CMR 582	May 4, 1996	1
Identification of Fish Spawning Areas and Designation of Salmonid Spawning Areas	06-096 CMR 585	May 4, 1996	2
Rules Pertaining to Class A Waters	06-096 CMR 586	May 4, 1996	2
Other			
Letter from Jon H. Edwards, Assistant Attorney General (1/29/90), supporting a statutory interpretation.	Outside of statute or regulation	NA	5

* Not yet determined. Enacted or amended by the First Regular Session of the 119th Legislature (non-emergency provisions)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

February 9, 2004

Dawn Gallagher, Commissioner
Maine Department of Environmental Protection
#17 State House Station
Augusta, Maine 04333-0017

SUBJECT: **EPA Review of Chapter 257 Water Quality Standard Revision**

Dear Commissioner Gallagher:

The Environmental Protection Agency (EPA) has completed its review of Chapter 257 (LD 1137), "An Act Regarding Riverine Impoundments", as required by 33 U.S.C. 1313(c). This legislative chapter revised the surface water quality standards administered by the DEP's Bureau of Land & Water Quality, and was certified by Maine's Assistant Attorney General in the Natural Resources Division on December 17, 2003 as having been duly adopted pursuant to state law (passed by the Maine Legislature on May 20, 2003, and signed into law by the Governor on May 23, 2003). EPA is continuing its review of Chapter 418 and the other chapters from the Department's August 26, 2003 submittal of legislation enacted by the First Regular Session of the 121st Legislature.

I hereby approve the revised water quality standards in Chapter 257. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act and 40 CFR Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. In making this approval, we have a few comments concerning Chapter 257 (see attachment A).

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under Section 303(d) for those waters.

My staff and I look forward to continued cooperation with the ME DEP in exercising our shared responsibility of implementing the water quality standard requirements under the CWA. If you have any questions on these issues, please contact Steve Silva, Director of EPA New England Maine Program, at 617-918-1561.

Sincerely,

Ken Munn for

Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosures

cc: Andrew Fisk, ME DEP
David Courtemanch, ME DEP
Brian Kavanah, ME DEP
Dana Murch, ME DEP
Vernon Lang, USF&WS
Mary Colligan, NMFS
Peter Colossi, NMFS
Edward Hanlon, EPA HQ

Attachment A to February 9, 2004 letter from EPA to ME DEP

Comments on Chapter 257

Chapter 257 ***An Act Regarding Riverine Impoundments***

EPA has reviewed Chapter 257, and would like to point out that the narrative standard in the final paragraph is an important confirmation that the 2003 revisions are consistent with the CWA ("dissolved oxygen concentration in existing riverine impoundments must be sufficient to support existing and designated uses of these waters"). It is our understanding that ME DEP intends to monitor dissolved oxygen (to within 0.5 m of the bottom) for the entire water column of any impoundment, and that compliance with the narrative criterion (as set forth in the final paragraph of sub-section 13 and quoted above) will still be determined throughout the waterbody including where compliance with the numeric criteria is not measured (as set forth in sub-sections 13. B. and C.), to ensure that the waterbody as a whole will attain existing and designated uses. Application of the narrative criterion for riverine impoundments below the point of thermal stratification and in areas of inhibited mixing due to natural topographical features is important to assure that water quality impacts are assessed and addressed in determining whether water quality standards are met in the impoundment as a whole.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

April 14, 2004

Dawn Gallagher, Commissioner
Maine Department of Environmental Protection
#17 State House Station
Augusta, Maine 04333-0017

SUBJECT: **EPA Review of Chapters 227, 245, and 317 Water Quality Standard Revisions**

Dear Commissioner Gallagher:

The Environmental Protection Agency (EPA) has completed its review of Chapters 227, 245, and 317, as required by 33 U.S.C. 1313(c).

Chapter	Title
227	An Act to List Agriculture as a Designated Use in Water Quality Standards
245	An Act to Amend Certain Laws Administered by the Department of Environmental Protection
317	An Act to Reclassify Certain Waters of the State

These legislative chapters revised the surface water quality standards administered by the Department of Environmental Protection's (DEP's) Bureau of Land & Water Quality, and were certified by Maine's Assistant Attorney General in the Natural Resources Division on December 17, 2003 as having been duly adopted pursuant to state law. EPA is continuing its review of Chapter 418 and the other chapters from the Department's August 26, 2003 submittal of legislation enacted by the First Regular Session of the 121st Legislature.

First, I thank you and your staff for an impressive effort with regard to the upgrading of use classifications for numerous water body segments. In many cases waters were reclassified to Class AA or SA, Maine's most protective classifications for freshwater and saltwater respectively. These reclassifications will significantly strengthen Maine's ability to protect its waters and further progress towards achieving the objectives of the Clean Water Act (CWA).

I hereby approve the revised water quality standards in Chapters 227 and 317. Chapter 227 adds a designated use to Maine's classifications, and Chapter 317 upgrades the classifications of numerous water segments. This approval is made pursuant to Section 303(c)(2) of the Clean Water Act (CWA) and 40 C.F.R. Part 131, and is based on my determination that the approved revisions are consistent with the requirements of Section 303 of the Act. In making this approval, we have a few comments concerning Chapters 227 and 317. (see attachment A).

EPA is not taking action at this time on the water quality standards revision in Chapter 245, *An Act to Amend Certain Laws Administered by the Department of Environmental Protection, Sec. 7.38 MRSA Sec. 464, sub-Sec. 3, Paragraph B* . This revision changes the frequency with which the Board will hold public hearings for the purpose of reviewing Maine's water quality standards (and revising where appropriate) from at least once every three years, to at least once every four years, Federal regulations at 40 CFR §131.20 require the frequency of state water quality standards reviews, and revisions as necessary, to be at least once every three years. In his letter of December 17, 2003, Maine's Assistant Attorney General indicated that this change to a four-year review frequency in Section 7 of Chapter 245 appears to be in conflict with EPA's regulations. We understand, based on verbal confirmation by DEP staff, and the State of Maine Legislature website, that with the passage of LD 1655 the three-year period of review in 38 MRSA Sec. 464, sub-§3, Paragraph B has recently been restored to ensure consistency with the federal regulations. As of March 16, 2004, Chapter 551 (LD 1655) was signed by the Governor and will be effective 90 days after the end of the current legislative session.

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under Section 303(d) for those waters.

My staff and I look forward to continued cooperation with the ME DEP in exercising our shared responsibility of implementing the water quality standard requirements under the CWA. If you have any questions on these issues, please contact Steve Silva, Director of EPA New England Maine Program, at 617-918-1561.

Sincerely,

Linda M. Murphy

Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosure

cc: Andrew Fisk, ME DEP
David Courtemanch, ME DEP
Brian Kavanah, ME DEP
Vernon Lang, USF&WS
Mary Colligan, NMFS
Peter Colossi, NMFS
Edward Hanlon, EPA HQ

Comments on Chapters for which Water Quality Standards Revisions are Approved

1. **Chapter 227.** ***An Act to List Agriculture as a Designated Use in Water Quality Standards.***

Chapter 227 adds agriculture as a designated use to Maine's freshwater use classifications (AA, A, B, C, GPA). This revision is consistent with Section 303(c)(2)(A) of the Clean Water Act and 40 CFR §131.10(a) which explicitly list agriculture as a use that states are to consider when designating uses. EPA would like to point out that listing agriculture as a designated use in water quality standards sets the goal that the water is to be of sufficient quality to support agricultural uses of that water. Any determination to allow the withdrawal of water for agriculture should only be made after full consideration of the existing uses and other designated uses of the waterbody, the applicable physical, chemical, and biological criteria, and Maine's antidegradation provisions. For example, Class AA waters are defined as "free flowing and natural" and are recognized by Maine as Outstanding National Resource Waters (ONRW).

2. **Chapter 317** ***An Act to Reclassify Certain Waters of the State***

Chapter 317 upgrades the use classification for numerous water body segments. These revisions are consistent with the CWA because in all cases the waters' designated use goals continue to be consistent with the goal uses of the CWA at section 101(a)(2), and are upgraded to subcategories of those uses that require more stringent criteria.

Provisions in Chapter 317, Sec. 6, 38 MRSA §467, sub-§4 A.(13), concerning license limits for residual chlorine and bacteria are not water quality standards, and therefore are not subject to EPA action under Section 303(c) of the Act.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

January 25, 2005

Dawn Gallagher, Commissioner
Maine Department of Environmental Protection
#17 State House Station
Augusta, Maine 04333-0017

SUBJECT: EPA Review of 2004-submitted Water Quality Standard Revisions

Dear Commissioner Gallagher:

This is in response to your May 14, 2004 request for Environmental Protection Agency (EPA) approval of statutory and regulatory amendments of the surface water quality standards administered by the Maine Department of Environmental Protection (DEP), Bureau of Land & Water Quality. These amendments were certified by Maine's Assistant Attorney General in the Natural Resources Division as having been duly adopted pursuant to State law. EPA has completed its review of these amendments as required by §303(c) of the Clean Water Act, 33 U.S.C. §1313(c). I am pleased to approve most of the changes as described further below.

I congratulate you and your staff for a very impressive effort, particularly with regard to the adoption of Chapter 579 of DEP's Rules: Classification Attainment Evaluation Using Biological Criteria for Rivers and Streams. Adoption of this rule is a noteworthy event in DEP's long history as a national leader in the development and implementation of biological criteria. This quantitative methodology for interpreting Maine's narrative biological criteria and aquatic life uses for rivers and streams will strengthen Maine's ability to protect its waters and further progress towards achieving the goals and objective of the Clean Water Act.

Pursuant to §303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131, and based on my determination that the approved revisions are consistent with the requirements of §303 of the Act, I hereby approve the following revised standards:

- ***Legislative Chapter 418 [specifically, §420 (1-B)(A), (C), (D), and (E)]***, which establishes mercury ambient water quality criteria to protect aquatic life, and criteria for human health protection based on a concentration in fish tissue, that are consistent with EPA's current Clean Water Act §304(a) criteria guidance.

- ***Legislative Chapter 551, §6*** , which reverses an earlier change to statute and ensures that a hearing will be held at least once every three years for the purpose of reviewing Maine's water quality standards, and revising them as appropriate, consistent with 40 C.F.R. §131.20.

- *Legislative Chapter 551, §7*, which corrects an error with regard to the boundary between freshwater and saltwater in the classification of the Denny's River.

- *Legislative Chapter 574*, which revises Class AA and Class A to allow discharges intended to assist in the restoration of endangered Atlantic Salmon.

- *Legislative Chapter 663*, which upgrades the use classification for numerous water body segments. In all cases, both the previous and new use classifications provide for the full goal uses specified at §101(a)(2) of the Clean Water Act.

- *DEP Rule, Chapter 579*, which provides a quantitative methodology for interpreting Maine's narrative biological criteria and aquatic life uses for rivers and streams.

EPA's approval of Maine's surface water quality standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time. EPA will retain responsibility under §303(c) and 303(d) of the Clean Water Act for those waters. The revisions summarized above are further described in *Summary: Changes to Maine's Water Quality Criteria*, ME DEP, May 13, 2004. In making this approval, we have a few comments concerning Chapters 418 and 574 (see attachment A).

Also, please note the following:

- *Legislative Chapter 418, §420 (1-B)(B)* - We are still evaluating this provision to determine whether it constitutes a revision of Maine's water quality standards; therefore we are not yet taking action with respect to this provision.

- Finally, we have determined that the remaining provisions of Chapter 551, and the additional Chapters submitted by DEP, are not new or revised water quality standards and therefore are not subject to EPA review and action under §303(c) of the Clean Water Act (see Attachment B).

My staff and I look forward to continued cooperation with the ME DEP in exercising our shared responsibility of implementing the water quality standards requirements under the Clean Water Act. If you have any questions on these issues, please do not hesitate to call me at 617-918-1501 or contact Steve Silva, Director of EPA New England's Water Quality and Maine Programs, at 617-918-1561.

Sincerely,

Linda M. Murphy

Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosure

cc: Andrew Fisk, ME DEP
David Courtemanch, ME DEP
Brian Kavanah, ME DEP
Vernon Lang, USFWS
Mary Colligan, NMFS
Peter Colosi, NMFS
Dana Thomas, EPA WQSB

1. **Chapter 418.** An Act to Implement the Recommendations of the Department of Environmental Protection on Ambient Water Quality Criteria for Mercury.

EPA is approving Chapter 418, Section 3's enactment of 38 MRSA §420(1-B)(A), (C), (D), and (E). We are continuing to evaluate §420(1-B)(B) to determine whether it constitutes a revision of Maine's water quality standards; therefore we are not yet taking action with respect to this provision.

Subsection(1-B)(A) establishes the following ambient water quality criteria for mercury:

	Freshwater Acute	Freshwater Chronic	Saltwater Acute	Saltwater Chronic	Human Health
Total Mercury	1.7 ug/l	0.91 ug/l	2.1 ug/l	1.1 ug/l	0.2 mg/kg edible tissue

The aquatic life criteria expressed as total mercury are equivalent to EPA's current CWA §304(a) recommendations for dissolved mercury as contained in National Recommended Water Quality Criteria: 2002, EPA-822-R-02-047, November 2002 . Maine's aquatic life criteria are as protective as EPA's recommendations; however, EPA's 1995 Updates: Water Quality Criteria Documents for the Protection of Aquatic Life in Ambient Water, EPA-820-B-96-001, September 1996 contain a note that the freshwater mercury chronic criterion might not adequately protect rainbow trout, coho salmon, and bluegill. While EPA expects that water quality based control of mercury in Maine will typically be driven by the human health criterion, this caution concerning aquatic life protection should be considered if the chronic freshwater criterion is applied absent more stringent actions to meet the human health criterion.

EPA also believes that Maine's tissue based human health criterion is as protective as EPA's tissue based criterion recommendation of 0.3 mg/kg for methylmercury, published on January 8, 2001 (66 FR 1344-1359). Maine's value is one third lower than EPA's, and is expressed in terms of total mercury (while methylmercury and total mercury in tissue are essentially equivalent in upper trophic level fish, Maine's expression of its criterion as total mercury provides equal or greater protection).

Subsection(1-B) (C) provides for the establishment of site-specific bioaccumulation factors for mercury, which is consistent with EPA's allowance for modification of its §304(a) guidance to reflect site-specific conditions at 40 C.F.R. § 131.11(b)(1)(ii).

Subsection(1-B) (D) directs ME DEP to establish a statewide bioaccumulation factor (BAF) which is "protective of 95% of the waters of the state." In approving this provision, EPA understands this statement was meant to allow use of "either 1) the 95th

upper confidence level on a single mean point estimate of a BAF, if a single BAF is appropriate for the state, or 2) the 95th percentile of BAFs to protect 95% of the waters, if BAFs vary with waters," with the section regarding site-specific BAFs providing for a higher BAF if appropriate to protect specific waters (May 21, 2004 response from DEP to EPA questions seeking clarification). EPA believes this approach is consistent with established methodologies used to develop criteria, and allows Maine to be appropriately protective of all of its waters.

Subsection(1-B)(E) directs DEP to establish statewide ambient water quality criteria for mercury to protect wildlife, which EPA supports consistent with the goals of the CWA.

Section 1 of Chapter 418 (which enacts 38 MRSA § 413, sub-§11) relates to NPDES permitting and is not considered to be a water quality standard subject to EPA review and action under § 303(c) of the CWA. DEP, in its May 21, 2004 response to EPA's questions seeking clarification of Chapter 418, clarified that references to antidegradation requirements highlight important antidegradation considerations and do not override or conflict with the antidegradation provisions at 38 MRSA § 464(4)(F).

2. **Chapter 574.** An Act to Amend Water Quality Laws to Aid in Wild Salmon Restoration.

Chapter 574 revises Maine's Class AA and Class A provisions to allow discharges intended to assist in the restoration of endangered Atlantic Salmon. Waters classified as AA in Maine are considered outstanding national resources, and water quality is to be maintained and protected [38 MRSA § 464(4)(F)(2)]. We interpret "maintained and protected" to mean no new or increased discharges to Outstanding National Resource Waters (ONRWs) and their tributaries that would lower water quality, with some exception for limited activities that result in temporary and short-term changes in water quality (Water Quality Standards Handbook: Second Edition, EPA-823-B-94-005a, August 1994). However, the discharges that could be authorized by DEP based on Chapter 574 must be for the express purpose of assisting in the restoration of endangered Atlantic salmon by restoring water quality that has been degraded by anthropogenic activity. The Chapter 574 discharge provision is not an authorization to lower water quality in ONRWs. Further, EPA believes that the intent to restore natural ambient water chemistry to aid in the restoration of endangered salmon is consistent with the overall objective of the CWA at 101(a). Therefore, EPA is approving this limited discharge provision.

Attachment B to January 25, 2005 Maine Water Quality Standards Approval Letter

Except as noted in the attached letter, chapters listed below in the first column in bold are acted upon within this letter. Chapters listed in regular text, and sections not included in the chapters listed in bold, are not new or revised water quality standards and therefore are not subject to EPA review and action under § 303(c) of the Clean Water Act.

Chapter	Title of Statute or Rule	Effective date under ME Law
Ch. 418 § 3	(LD 1308) An Act to Implement the Recommendations of the Department of Environmental Protection on Ambient Water Quality Criteria for Mercury	6/15/01 Statute
Ch. 551 § 6 & 7	(LD 1655) An Act to Amend Laws Relating to Environmental Protection	7/30/04 Statute
Ch. 574	(LD 1833) An Act to Amend Water Quality Laws to Aid in Wild Atlantic Salmon Restoration	7/30/04 Statute
Ch. 650	(LD 1158) An Act to Protect Maine's Coastal Water	7/30/04 Statute
Ch. 663	(LD 1891) An Act to Reclassify Certain Downeast Waters	7/30/04 Statute
Ch. 232	(LD 1477) An Act to Amend Certain Laws Regarding Land and Water Quality Protection [enacts provision concerning cooling water intake structures, clarification of definition for "publicly owned treatment works".]	9/21/01 Statute
Ch. 519 (amended)	Interim Effluent Limitations and Controls for the Discharge of Mercury	10/6/2001 Rule
Ch. 579	Classification Attainment Evaluation Using Biological Criteria for Rivers and Streams	5/27/2003 Rule

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

DATE: July 20, 1993

SUBJ: Penobscots Treatment as a State under CWA § 518(e) for Purposes of Receiving CWA § 106 Grant

FROM: Julie Taylor, Chief, General Law Office

TO: Harley F. Laing, Regional Counsel

I. SUMMARY.

The Penobscot Nation (the Penobscots or the Tribe) has applied to EPA for Treatment as a State (TAS) status under § 518(e) of the Clean Water Act (CWA) (also known as the Federal Water Pollution Control Act), 33 U.S.C. § 1377(e). The Tribe seeks to receive grant funds under § 106 of the CWA to develop a water quality management plan for the Tribe's water resources in Maine.

I have concluded that the Penobscots should receive approval of a limited TAS status that would allow them to receive the § 106 grant. This conclusion is based on my review of the standards for granting TAS status as well as the following: the Maine Indian Claims Settlement Act (both federal and state Acts); legislative history; EPA statutes, regulations, and guidance; U.S. and Maine Supreme Court cases interpreting Indian jurisdictional issues; legal opinions by the Penobscots' legal counsel; and submissions by the Penobscots on its legal governing provisions, resources program, correspondence, previous grants, and other materials.

The TAS status for the Penobscots should be limited to the water quality CWA § 106 grant purposes and to the water resources over which the Tribe exercises management and protection functions for purposes of the grant activities. It is necessary to note these limitations because of jurisdictional issues presented on the scope of the Penobscots authority to regulate land and natural resources on and near the Penobscot Indian Reservation; these issues are discussed below in the jurisdiction section. These limitations do not result in a lesser TAS determination for § 106 purposes; they are intended instead to clarify that determination of this TAS status does not extend beyond this grant and that any future applications by the Penobscots for EPA grants or approval authority may be subject to additional jurisdictional analysis because of the special jurisdictional issues noted below.

I nevertheless recommend that the Penobscot Nation be granted Treatment as a State status under CWA § 518(e) for the purposes of receiving and administering a CWA § 106 grant. I believe the Penobscots have satisfied the statutory requirements of CWA § 518, 33 U.S.C. Section 1377, and the regulatory requirements of 40 Code of Federal Regulations (CFR) Part 130.

II. TAS REQUIREMENTS.

There are four criteria for approval of treatment as a state (TAS) status. The first three are that the Tribe possesses the requisite three elements under CWA § 518(e) of governmental authority, jurisdiction over the resources affected by the statute or program, and capability. The fourth criteria is that the Tribe meets the requirement of being a federally recognized tribe pursuant to CWA § 518(h)(2).

EPA regulations reiterate these requirements. 40 CFR § 130.6(d). The preamble to the regulations explains how these requirements may be met by a Tribe providing the following in its application:

1. Governmental Authority: "[A] narrative statement (1) describing the form of Tribal government; (2) describing the types of essential governmental functions currently performed; and (3) identifying the sources of authorities to perform those functions (e.g. Tribal constitutions, codes, etc.)." Indian Tribes: Water Quality Planning and Management, 40 CFR parts 35 and 130 (Interim Final Rule), 54 Fed. Reg. 14354, 14355 (April 11, 1989). EPA "believes that most Tribes will be able to meet this criterion without much difficulty." Id.

2. Jurisdiction: "[A] statement signed by the Tribal Attorney General or an equivalent official explaining the legal basis for the Tribe's regulatory authority over its water resources." Id. After this statement is received, the Region notifies "all appropriate governmental entities" as to the substance of the statement. 40 CFR § 130.15(b).

3. Capability: Neither the regulation nor the preamble identifies any specific showings a Tribe must make in order to meet the capability requirement, but the preamble notes five factors that EPA may consider (although EPA is not limited to these five): (1) The Tribe's previous managerial experience; (2) existing environmental or public health programs; (3) existing or proposed staff resources and continuity of staff; (4) the Tribe's accounting and procurement systems; and (5) the mechanisms in place or available for carrying out the executive, legislative, and judicial functions of the Tribal government. Preamble to Indian Tribes: Water Quality Planning and Management (Interim Final Rule), 54 Fed. Regis. at 14356 (4/11/89).

4. Recognized Tribe: Some "documentation that [the Tribe] is recognized by the Secretary of the Interior." Id. This requirement can ordinarily be met by showing the Tribal applicant's inclusion on a list of Federally recognized Tribes published by the Secretary of the Interior. Id.

III. ANALYSIS.

An analysis of the statutory elements follows.

A. Governmental Authority: The Tribe has "a governing body carrying out substantial governmental duties and powers".[1]

The Penobscot Nation has the powers and authorities that permit the Tribe to act as its own governing body.

The Penobscots' governing body includes an elected Tribal Governor, Lieutenant Governor, and Tribal Council. The Governor and Council are responsible to all Tribal members[2] and represent their interests in all areas of concern. The Tribal Governor and Council are responsible for protecting the rights of the Penobscot Nation, for conducting all Tribal affairs and managing all Tribal resources and programs, and for carrying out the Tribal laws and mandates of the Tribal General Meeting. There are Rules of Council, which function like by-laws for the Tribal Council. Both the Federal and State Maine Indian Claims Settlement Acts provide that the Governor and Council are the governing agents for the Penobscot Nation. See 25 U.S.C. §§ 1721(a)(3), 1722(k), and 1726; 30 Maine Revised Statutes Annotated (MRSA) §§ 6203(10), 6206.

The Penobscots also elect a Representative to the Maine State Legislature who has seating and speaking privileges but no vote.

The elections for Tribal Governor, Lieutenant Governor, and Representative are held every two years. The Council has twelve members elected for four-year terms.

The Penobscot Judicial System has been in existence since 1979. This system consists of the Penobscot Tribal Court, which is in regular session every other Wednesday of each month, the Special Tribal Court which schedules sessions as they are needed, and the Appellate Panel which convenes whenever an appeal from decision of the Tribal Court is filed. The Penobscot Judicial System exercises exclusive jurisdiction, separate and distinct from the State of Maine, over several areas. This jurisdiction is both provided for and limited by the Maine Indian Claims Settlement Act, and is discussed in more detail below in the jurisdiction section.

I conclude that the Penobscots have made the requisite showing of governmental authority.

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[1]CWA § 518(e)(1), 33 USC § 1377(e)(1); 40 CFR §130.6(d)(1).

[2]The 1987 Tribal census noted 1,852 members.

B. Jurisdiction over Tribal Water Resources: The "functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe ... or otherwise within the borders of an Indian reservation".[3]

This section discusses the special jurisdictional analysis required for the Penobscots in light of the Maine Indian Claim Settlement Acts, issues about the physical boundaries of the Reservation, and the provisions of the Cooperative Agreement between Maine and the Penobscots, after noting a few general principles of law regarding jurisdiction over lands and natural resources within Indian territories.

1. CWA § 106 Purposes.

The determination of whether the Penobscots are eligible for treatment-as-state status under a Clean Water Act § 106 grant should focus on jurisdiction over resources relevant to the purposes of the 106 grant. Section § 518(e) authorizes EPA "to treat an Indian tribe as a State for purposes of Subchapter II [grants for construction of treatment works] and sections ... 1256 [§ 106 grants].. of this title to the degree necessary to carry out the objectives of this section [518], but only if [the Tribe meets the TAS criteria]." Section 106 authorizes grants to States to develop and implement programs to control surface water pollution and protect groundwater.[4]

EPA has a statutory obligation to determine that a Tribe exercises management and protection functions over a water resource before treating the Tribe as a State for purposes of that water resource. Preamble to Indian Tribes: Water Quality Planning and Management, 54 Fed. Reg. 14354, 14355. Section 518(e)(2) of the Clean Water Act states that a Tribe may be treated as a State only if "the functions to be exercised by the Tribe pertain to the management and protection of water resources ... within the borders of an Indian reservation."

2. General law on Indian jurisdiction.

Indian Tribes are not subject to State law except in very limited circumstances. California v. Cabazon Band of Mission Indians,

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[3]CWA § 518(e)(2), 33 USC § 1377(e)(2); 40 CFR §130.6(d)(2).

[4]"[F]or grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies." 33 U.S.C. § 1256.

480 U.S. 202, 216 and n.18 (1987). In general, Indian tribes are sovereign governments whose authority is subject only to Congressional approval. See Worcester v. Georgia, 31 U.S. (10 Pet.) 515 (1832). Federal statutes which might arguably abridge Tribal powers of self-government must be construed narrowly in favor of retaining Tribal rights. See Felix Cohen, Handbook of Federal Indian Law 244 (1982). Under the "Montana" test, tribes may regulate activities on Indian territory, including activities of non-Indians, where activities directly threaten the health and safety of the Tribe. Montana v. U.S., 450 U.S. 544, 565 (1981).

A 1993 U.S. Supreme Court decision on Indian jurisdiction noted two principles about Tribal authority to regulate activities on a reservation: (1) Tribes generally lack authority over non-Indians who own lands in fee that are within the boundaries of a reservations; but (2) Tribes may nevertheless retain authority to regulate conduct within reservation boundaries that "'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" South Dakota v. Bourland, Slip op. at 15 (U.S. Supreme Court No. 91-2051, June 14, 1993), quoting Montana, 450 U.S. at 565-66.

3. Jurisdiction under the Maine Indian Claims Settlement Acts.

There is both Federal and State legislation that has profound impacts on the relative jurisdictional authorities of the State of Maine and the Penobscot Nation over the Penobscot Indian Reservation and the Penobscot Indian Territory.

The Maine Indian Claims Settlement Act (also known as the Maine Implementing Act) was passed in 1979. 30 Maine Revised Statutes Annotated (MRSA) §§ 6201-6214 (the State Act). The State Act was ratified by the federal Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (the Federal Act). The Acts settled the litigations filed by the Penobscots and other Maine Tribes.[5]

These Acts present unique issues for EPA Region 1 in evaluating jurisdiction.[6] Most other Tribes around the country do not face

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[5]Under 25 U.S.C. § 1724, the Penobscot Nation and the Passamaquoddy Tribe received $13.5 million each to be held and invested for the Tribes by the Department of Interior and $26.8 million each for a land acquisition fund; the Houlton Band of Maliseet Indians received $900,000 for land acquisition.

[6]There are, however, other New England states (and tribes) affected by settlement act legislation besides Maine and the Penobscots: Rhode Island (Narragansett); Massachusetts (Wampanoag); Connecticut (Pequot); and Maine (Passamaquoddy, Micmac, and Houlton Band of Maliseet). See 25 U.S.C. §§ 1701-1771 et seq.

similar limitations from state Indian claims settlement acts.[7]

3.(a). The Federal Maine Indian Claims Settlement Act of 1980.

The 1980 Federal Act, referring to the State Act, declares as its purposes:

> 1. To remove the cloud on the titles to land in the State of Maine resulting from Indian claims;
>
> 2. To clarify the status of other land and natural resources in the State of Maine;
>
> 3. To ratify the Maine Implementing Act [the State Act], which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation; and
>
> 4. To confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.[8]

25 U.S.C. § 1721(b).

The Federal Act defines the laws of the State for purposes of the Act to include enactments of political subdivisions (such as towns) and future amendments and judicial opinions:

> "laws of the State" means the constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof.

25 U.S.C. § 1722(d).

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[7]There are a few non-New England states with Indian land claims legislation, but the claims and settlements in New York and South Carolina, for example, differ significantly from those in Maine for various reasons. See Vollmann, A Survey of Eastern Indian Land Claims: 1970-1979, 31 Maine Law Review 5, 12 (1980).

[8]The Acts mainly address the Penobscots and the Passamaquoddy. The Federal Act under 25 U.S.C. § 1725 provides that all Indians other than the Penobscot Nation and Passamaquoddy Tribe shall be subject to civil & criminal jurisdiction of the state to same extent as any other person (except for the provisions under § 1727(e) and § 1724(d)(4) concerning the Houlton Band of Maliseet Indians that are not relevant to the issues in this memo). Under the State Act, the Houlton Band of Maliseet Indians in Maine is "wholly subject to the laws of the State." 30 MRSA § 6202.

The critical jurisdictional section of the Federal Act is § 1725, which ratifies the State Act, limits the application of federal Indian law in Maine if it would affect State law, and bars the application of future federal Indian law in Maine unless the federal legislation specifically notes its applicability in Maine.

The subsection of § 1725 of the Federal Act that ratifies the State Act provides that the Penobscots are subject to state jurisdiction to the extent and in the manner provided in the State Act:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act [the State Act] and that Act is hereby approved, ratified, and confirmed.

25 U.S.C. § 1725(b)(1). This subsection notes the State's jurisdiction over the Tribe. A second subsection takes the other angle on jurisdiction and ratifies the State Act's provisions for separate Tribal jurisdiction: "The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act [the State Act], and any subsequent amendments thereto." 25 U.S.C. § 1725(f).

Subsection 1725(h) is a critical provision of the Federal Act that explicitly and completely prohibits the application to the Penobscots of any federal law that (1) gives special status to the Tribe and (2) "affects or preempts" Maine's civil, criminal, or regulatory jurisdiction. 25 U.S.C. § 1725(h). This provision specifically includes state environmental law and land use law:

> Except as otherwise provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. § 1725(h). This subsection would seem to invalidate federal laws that might give the Penobscots special status, including treatment as a state, for certain environmental programs or purposes if it would "affect or preempt" the State's authority, including the State's jurisdiction over environmental and land use matters.

The final critical provision of the 1980 Federal Act for jurisdictional analysis relates to future legislation. Future federal legislation for the benefit of Indians that "would affect or preempt" state laws (including the State Act) would not apply in Maine unless the federal legislation specifically addressed its application in Maine:

> The provisions of any federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act [the State Act], shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b). Thus any post-1980 special federal legislative provisions that might give Indians special jurisdictional authority (if, for example, any federal laws in the 1980's provided authority for EPA approval of a Tribal environmental program equivalent to a state environmental program delegated by EPA to the state) could not provide the Penobscots with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

Finally, the Federal Act provides that in a conflict of interpretation between the provisions of the State and Federal Acts, the Federal Act would govern. 25 U.S.C. § 1725(a). The Federal Act also consents to the amendment of the State Act at 25 U.S.C. § 1725(e)(1), but State legislative history discussed below attempts to limit the amendment process.

3.(b) The State Indian Claims Settlement Act (Implementing Act).

The 1979 State Act addresses the scope of jurisdictional authority of the Penobscot Nation in several sections. Under § 6206 of the State Act, the Penobscots have (within their Territory) all the authority of and all the limitations of a municipality under Maine law (except as otherwise provided in the Act), but "internal tribal matters" are not subject to regulation by the State:

> 1. General Powers. Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State applicable to the respective Indian territories and the residents thereof.....[9]

30 MRSA § 6206(1). Note that the Tribe's general powers of a municipality are not limited to those enumerated, but also that this general powers section is limited by the initial clause of "[e]xcept as otherwise provided" in the Act.

A second key jurisdictional subsection of § 6206 of the State Act provides that the Penobscots have exclusive jurisdiction over members of the Tribe who violate Tribal ordinances, but the State has exclusive jurisdiction over non-Tribal members who violate Tribal ordinances on the Reservation and the State may assume exclusive jurisdiction over Tribal members for such violations if the Tribe chooses not to exercise the Tribe's exclusive jurisdiction:

> 3. Ordinances. The Passamaquoddy Tribe and the Penobscot Nation each shall have the right to exercise exclusive jurisdiction within its respective Indian territory over violations by members of either tribe or nation of tribal ordinances adopted pursuant to this section [6206] or section 6207. The decision to exercise or terminate the jurisdiction authorized by this section shall be made by each tribal governing body. Should either tribe or nation choose not to exercise, or to terminate its exercise of, jurisdiction as authorized by this section or section 6207, the State shall have exclusive jurisdiction over violations of tribal ordinances by members of either tribe or nation within the Indian territory of that tribe or nation. The State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or

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[9]The rest of the subsection concerns rights to vote and receive services.

nation.

30 MRSA § 6206(3).

These two subsections 6206(1) and (3) of the State Act allow the Penobscots the jurisdiction to enact environmental ordinances to the same extent as a municipality. They also limit the Penobscots' jurisdiction relative to the State's to the same extent that a Maine municipality would be limited by the State's powers. Municipalities in Maine may not act where state law has preempted the field. See Schwanda v. Bonney, 418 A.2d 163 (Me. 1980). The Penobscots could, however, exercise exclusive jurisdiction under § 6210(1) to enforce whatever environmental ordinances it had the authority to enact under § 6206(1).

4. Jurisdiction to Enforce Certain Civil, Criminal, Juvenile, and Other Laws and Ordinances.

Under § 6209(1) of the State Act, the Penobscots have exclusive jurisdiction separate and distinct from the State over certain criminal and civil offenses and family matters as follows:

> (a) Lesser criminal offenses committed on the Reservation by and against Tribal members;[10]
>
> (b) Juvenile crimes equivalent to (a);
>
> (c) Civil actions between Tribal members arising on the reservation that are small claims under state law and civil actions against Tribal members involving conduct of a Tribal member on a reservation;
>
> (d) Indian child custody proceedings as authorized by federal law; and
>
> (e) Other domestic relations matters of marriage, divorce, and support between Tribal members who live on the reservation.

30 MRSA § 6209(1). This section could theoretically provide the Tribe jurisdiction over some minor violations of environmental laws or ordinances. If the Tribe chooses not to exercise this jurisdiction, the State has exclusive jurisdiction over these matters. Id. The State has exclusive jurisdiction over all other state criminal laws within the Reservation. Id. See also 25 U.S.C. §§ 1301-1303 and 25 U.S.C. § 1725(c) (criminal jurisdiction on Indian reservations).

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[10]But see 30 MRSA § 6209(3),(4) regarding State jurisdiction over lesser criminal offenses and double jeopardy in State courts.

The State Indian Claims Settlement Act also addresses law enforcement in Penobscot Territory, which could include environmental enforcement. Under § 6210(1), the Penobscots have exclusive authority to enforce Tribal ordinances adopted under § 6206 (municipal and internal tribal matters powers) and § 6207 (fishing and hunting powers) within the Penobscot Territory. They also have exclusive authority under § 6210(1) to enforce within the Reservation the criminal, civil, and domestic powers they have under § 6209(1). But the State has enforcement authority as well: under § 6210(2), State and county law enforcement officers have joint authority with the Penobscots to enforce all State laws other than those over which the Tribe has exclusive jurisdiction under § 6210(1) and to enforce Tribal-State Commission[11] regulations.

5. Hunting and Fishing Jurisdiction under the Acts.

Because the State Act's hunting and fishing provisions under § 6207 give jurisdiction over some matters to the Penobscots and over others to the State that may relate to jurisdiction over certain environmental matters for purposes of EPA jurisdictional analysis, I include the hunting and fishing jurisdiction provisions here.

The Tribe has exclusive authority under § 6207(1) within the Penobscot Territory to enact ordinances regulating: "(a) Hunting, trapping or other taking or wildlife; and (b) Taking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area." 30 MRSA § 6207(1). In addition, the Penobscot Nation "subject to the limitations of subsection 6, may exercise within their respective Indian territories all the rights incident to ownership of land under the laws of the State." 30 MRSA § 6207(1).

Subsection 6207(2) provides for State jurisdiction over the Penobscot Territory in the requirement that the Tribe maintain registration stations for bear, moose, and other wildlife killed in the Territory "in substantially the same manner as such wildlife are required to be registered under the laws of the State." This subsection applies to Tribal members as well as non-Tribal members, and the Tribe is to report to the State when and as the State Commissioner of Inland Fisheries and Wildlife "deems appropriate." 30 MRSA § 6207(2).

"Subject to the limitations of subsection 6, the [Maine Indian Tribal-State Commission established pursuant to § 6212 of the State Act] shall have exclusive authority to promulgate fishing rules or regulations" for ponds where at least half the shoreline

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[11]This Commission is discussed below in the hunting section.

is in Indian Territory, sections of a river both sides of which are within Indian territory, and sections of a river one side of which is within Indian territory for a continuous length of a half-mile or more. 30 MRSA § 6207(3).

Subsection 6207(6) provides for jurisdiction within Penobscot Territory by the State through the State Commissioner of Inland Fisheries and Wildlife (State Commissioner), who can conduct fish and wildlife surveys within the Territory to the same extent he can in other areas of the State. More significantly, the State Commissioner can order enforcement of state laws, rescind any Tribal ordinance if he finds that such Tribal ordinance is causing a significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or waters subject to the jurisdiction of the Tribe.

The specific provision of § 6207(6) of the State Act that allows the State to rescind Tribal ordinances and order enforcement of State laws within Penobscot Territory is lengthy:

> The Commissioner of Inland Fisheries and Wildlife, or his successor, shall be entitled to conduct fish and wildlife surveys within the Indian territories and on waters subject to the jurisdiction of the [Tribal-State] commission to the same extent as he is authorized to do so in other areas of the State. Before conducting any such survey the commissioner shall provide reasonable advance notice to the respective tribe or nation and afford it a reasonable opportunity to participate in such survey. If the commissioner, at any time, has reasonable grounds to believe that a tribal ordinance or [Tribal-State] commission regulation adopted under this section [6207], or the absence of such a tribal ordinance or commission regulation, is adversely affecting or is likely to adversely affect the stock of any fish or wildlife on lands or waters outside the boundaries of land or waters subject to regulation by the [Tribal-State] commission, the Passamaquoddy Tribe or the Penobscot Nation, he shall inform the governing body of the tribe of nation or the commission, as is appropriate, of his opinion and attempt to develop appropriate remedial standards in consultation with the tribe or nation or the commission. If such efforts fail, he may call a public hearing to investigate the matter further. Any such hearing shall be conducted in a manner consistent with the laws of the State applicable to adjudicative hearings. If, after hearing, the commissioner determines that any such ordinance, rule or regulation, or the absence of an ordinance, rule or regulation, is causing, or there is a reasonable likelihood that it will cause, a significant depletion of fish or wildlife stocks on lands or waters outside the boundaries of lands or water subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation

> or the [Tribal-State] commission, he may adopt appropriate remedial measures including rescission of any such ordinance, rule or regulation and, in lieu thereof, order the enforcement of the generally applicable laws or regulations of the State. In adopting any remedial measures the commission shall utilize the least restrictive means possible to prevent a substantial diminution of the stocks in question and shall take into consideration the effect that non-Indian practices on non-Indian lands or waters are having on such stocks. In no event shall such remedial measure be more restrictive than those which the commissioner could impose if the area in question was not within Indian territory or waters subject to [Tribal-State] commission regulation. In any administrative proceeding under this section the burden of proof shall be on the commissioner. The decision of the commissioner may be appealed in the manner provided by the laws of the State for judicial review of administrative action and shall be sustained only if supported by substantial evidence.

30 MRSA § 6207(6).

The Maine Indian Tribal-State Commission, which has certain regulatory jurisdiction over hunting and fishing matters as noted above, is established by § 6212 of the State Act. The Commission has four State members, four Tribal members, and an additional chair who is elected by the other members. One of the Tribal-State Commission responsibilities is to "review the effectiveness of this Act and the social, economic, and legal relationship" between the Penobscots and the State and make recommendations as it deems appropriate. 30 MSRA § 6212(3).

6. Legislative History on Jurisdiction.

Legislative history of the State Act indicates that the Act was intended to limit the jurisdiction of Indians in Maine, including the Penobscots, although it notes some exceptions.

The state legislative Committee report states:

> It is the understanding and intent of the Committee that this bill [the State Act] establishes the basic principle of full state jurisdiction over Indian lands within the State, including Indian Territory or Reservations. The bill provides specific exceptions to this principle in recognition of traditional Indian practices and the federal relationship to Indians.

The Report of the Maine Joint Select Committee on Indian Land Claims at 1.

> [E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Penobscot Nation v. Stilphen, 461 A.2d 478, 483 (Me. 1983), appeal dismissed, 464 U.S. 923, quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

The Court looked to the legislative history of the State and Federal Acts and noted that "[i]t was generally agreed that the acts set up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the state and federal governments." 461 A.2d at 489 (emphasis added).

In the Stilphen Court's view, even the Penobscot's attorney agreed that the State Act allowed for more extensive jurisdiction over the Penobscots than the typical State-Tribal relationship. The Court's opinion stated that:

> The Penobscot Nation's counsel acknowledged that the expansion of the State's jurisdiction over the Maine Indian tribes from what he conceived it previously to be was part of the quid pro quo for the State's going along with the settlement, which was necessary for the Nation to get the monetary benefits provided it by the settlement.

Id. at 488 n.7.

The Court rejected a broad interpretation of "internal tribal matters" (over which the Tribe had jurisdiction). The Maine Supreme Court instead interpreted "internal tribal matters" to mean those listed in the State Act (such as membership in the Tribe, the right to reside within a reservation, tribal government) and "other matters like them" such as matters of cultural or historical concern. Id. at 489-90.

The Stilphen Court's specific holding-- that the Penobscot's operation of beano games was not an "internal tribal matter" under 30 MRSA § 6206 and was therefore subject to the State's jurisdiction, 461 A.2d at 488-90[13]--is not directly on point for our jurisdictional analysis here.

The Maine Supreme Court's Stilphen opinion provides further support for concluding that the Maine Indian Claims Settlement Act does limit the jurisdiction of the Penobscot Tribe more severely than that of Tribes in many other states.

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[13]Note that this decision was prior to enactment of the 1988 Federal Indian Gaming Act that allows gambling on reservations.

8. Jurisdiction and Physical Boundaries.

The Penobscot Reservation in Old Town is located north of Bangor in south-central Maine. The State Act defines the "Penobscot Indian Reservation" to mean:

> The islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in said river northward thereof that existed on June 29, 1918, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1918, and prior to the effective date of this Act. If any land within Nicatow Island is hereafter acquired by the Penobscot Nation, or the secretary [of the Interior] on its behalf, that land shall be included within the Penobscot Indian Reservation.

30 MRSA § 6203 (8).

The State Act defines "Penobscot Indian Territory" as the Penobscot Reservation plus the first 150,000 acres of land acquired by the U.S. Department of the Interior from certain specified lands prior to April 1, 1988. 30 MRSA § 6203(9).

The Federal Act adopts the definitions of the State Act for the Penobscot Reservation and Territory. 25 U.S.C. § 1722(i) and (j). Its definition of "land or natural resources" includes water rights: land or natural resources are defined to mean "any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b). Therefore any jurisdiction over water rights that the Penobscots have would be governed by the Federal and State Acts' provisions for State and/or Tribal jurisdiction over land or natural resources.

Although the State Act defines the Reservation as noted above, this description does not define the precise boundaries of the Reservation, especially with regard to water boundaries. No map was included in with the Penobscot § CWA 106 TAS application. I do not believe the Penobscot Reservation boundaries are defined in any narrative or map with complete precision. I am not aware of any existing map that clearly delineates the water boundaries.

A key aspect of this lack of precision concerns what the Reservation's boundaries are with respect to the "thread" of the Penobscot River on either side of Indian Island and thus how

Maine common law would interpret the Reservation's boundaries.[14] Maine courts hold that an "owner of land adjoining a fresh water river owns to the thread of the river." See Spring v. Russell, 7 Me. (7 Greenl.) 273, 290 (1831); Brown v. Chadbourne, 31 Me. 9, 19 (1849); Central Maine Power co. v. Public Utilities Commission, 163 A.2d 762, 156 Me. 295, 327 (1960). Such riparian ownership rights could attach to ownership of islands in a river, which would go to the thread of the river's channel on either side of the island and the waters naturally in that channel. Warren v. Westbrook Mfg. Co., 29 A. 927, 86 Me. 32 (1893).

One part of the State Act's legislative history addresses and seems to adopt these common law riparian ownership rights, but another part of the legislative history seems to rebut that assumption; the enacted provisions do not address them either way. The Maine Legislature's Joint Select Committee noted riparian rights in defining the boundaries of the Tribe's ownership rights but only if they were express in the original treaties or operate by State law:

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law. Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law. However, the Common Law of the State, including the Colonial Ordinances, shall apply to this ownership. The jurisdictional rights granted by this bill (the State Act) are coextensive and coterminous with land ownership.

Report of Joint Select Committee on Indian Land Claims at 3.

The State could use other legislative history of the Act, however, to argue for more restrictive boundaries. Maine might point to another section of the Committee Report and assert that traditional riparian ownership rights do not attach to Indian Island on the Reservation under the State Act:

> The jurisdictional provisions relating to fish and wildlife use the term "side of a river or stream" which means the mainland shore and not the shoreline of an island.

The Report of the Maine Joint Select Committee on Indian Land Claims at 2 (emphasis added). This indicates legislative intent to treat island riparian rights under the State Act differently than mainland shore riparian rights under State Common Law.

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[14] I understand the "thread" of the river is roughly the middle of the river where the main channel flows.

A further element of lack of clarity on the jurisdictional limits of the Penobscot's ownership and authority relates to the link between water quality rights and riparian rights. Under Maine common law, water quality interests are a part of the property interest of riparian owners. See Standton v. Trustess of St. Joseph's College, 254 A.2d 597 (Me. 1969). It is not obvious how should this common law provision should be interpreted in light of the State Act and legislative history and the Stilphen decision. On the one hand, water quality interests might be considered within the Penobscots' property rights if the Tribe has riparian rights because of their ownership of islands in the River; these water quality interests might therefore not be subject to State jurisdiction. On the other hand, if the Tribe does not have riparian rights because of the State Act's legislative history, even if the boundary of the Reservation is in the middle of the river, the Penobscots might not have the jurisdiction to set water quality standards for the river, especially with the State Act's assertions of State jurisdiction.

Finally, the United States Supreme Court has noted there are significant complexities involved in determining ownership of and jurisdiction over river beds, banks, and submerged lands that are on or near Indian Reservations. See, e.g., Montana v. U.S., 450 U.S. 544, 551-57 (1981). The ownership and jurisdiction determinations can turn on, for example, whether the rivers are navigable or nonnavigable, whether rights to river waters are "necessary" to make the Reservations "liveable," and how particular Indian treaties should be interpreted. See id. at 551, 566 n.15, and 567-581.

Despite these elements of confusion about the physical boundaries of the Reservation and the resulting Tribal jurisdiction, I believe there is no dispute that some Penobscot Reservation land and natural resources are under the jurisdiction of the Penobscot Nation for purposes of the § 106 grant activities such as monitoring water quality. This conclusion is further supported by the Cooperative Agreement provisions noted below and by the Penobscots' § 106 application, which describes its intent to develop a water pollution control program for the surface water resources located on the Reservation.

If the Penobscots apply for other CWA programs or programs under the Safe Drinking Water Act or other statutes, however, more detailed descriptions of Reservation boundaries and of resources affected by the statutory program, such as surface waters and groundwater including sources of drinking water, would be required at the time the Tribe files its assertion of tribal jurisdiction over such resources. This factual information would be necessary in order to clarify whether or not the Tribe had legal jurisdiction over the resources for purposes of the particular EPA program.

9. Jurisdiction and The Cooperative Agreement.

The Penobscots and Maine have entered into a cooperative agreement that provides further support for the determination that TAS status should be granted despite the jursidictional complexities and unresolved issues noted above.

The "Penobscot Indian Nation - State of Maine Agreement" of June 1, 1992 (the Agreement) provides for "a comprehensive program for monitoring the water quality of the Penobscot River ... through implementation of a Penobscot National Water Quality Monitoring Program." The Agreement notes that the State is required to maintain a water quality management plan (WQMP) for all surface waters within the state, including the Penobscot River. The Tribe and the State "acknowledge the desirability of the Nation undertaking monitoring of the Penobscot River that meets or exceeds the requirements of the State's WQMP, and agree to work in cooperation to incorporate the Nation's efforts into the overall State Water Quality program."

The Agreement provides particular support for a § 106 TAS determination in that the Agreement provides that the Penobscots and the State "acknowledge and agree this Agreement is contingent on the receipt by the Nation of funding from EPA to carry out the purposes of this Agreement."

In addition, EPA provided notice to the State of Maine of the Penobscots' application for TAS status, including a copy of the Nation's statement of the legal basis for the Penobscots' regulatory jurisdiction over its water resources, and the State has not objected. The Cooperative Agreement also is evidence that the State would not dispute the Tribe's jurisdiction over water resources for purposes of the 106 grant monitoring activities.

10. Jurisdictional summary.

An Indian jurisdictional analysis by EPA should be fact-specific (with reference to a particular Tribe and State) and function-specific (with reference to a particular grant or program purpose). The analysis should start from the general federal Indian law principle that Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute or by implication." Felix Cohen, Handbook of Federal Indian Law 231-32 (1982). As noted above, however, the State and Federal Maine Indian Settlement Claims Acts present nearly unique issues for the jurisdictional analysis of the Penobscots' authority.[15]

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[15]Jurisdictional analysis here may reflect not only the Settlement Claims Acts, but also the unique and unsettled status of Indian Tribes under federal law. On the one hand, Tribes are

In the case of the Penobscots, both the legal boundaries of the Tribe's jurisdiction and the physical boundaries of the Reservation present ambiguities at their edges, but I believe both also have an undisputed jurisdictional core that clearly supports a determination of treatment as a state status under CWA §518(e)(2) for purposes of a CWA § 106 grant for water quality monitoring.

I therefore conclude that the Penobscots have made the requisite showing of jurisdiction over Tribal water resources sufficient for purposes of the § 106 grant.

C. Capability to Administer Grant Program: The Tribe "is reasonably expected to be capable, in [EPA's] judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CWA] and of all applicable regulations".[16]

The Penobscot Nation has successfully sought and operated several environmental and public health grant programs, so that it is clear that the Tribe is capable of operating environmental programs on the reservation and meeting the requirement that the Tribe be "reasonably expected to be capable, in [EPA's] judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CWA] and of all applicable regulations". CWA § 518(e)(3). Factors that may be considered in determining that a Tribe has the requisite skills include: (1) the Tribe's previous managerial experience; (2) existing environmental or public health programs administered by the Tribe; (3) existing or proposed staff resources and staff stability or continuity; (4) the Tribe's accounting and procurement systems; and (5) mechanisms in place or available for carrying out the executive, legislative, and judicial functions of tribal government. Indian Tribes: Water Quality Planning and Management, 40 CFR Parts 35 and 130, 54 Fed. Reg. 14354, 14356 (April 11, 1989).

The Penobscots have a well organized Natural Resources Department with a Land Committee and a Water Resources Committee. This department appears to EPA Region 1 be quite capable of organizing and implementing a CWA § 106 pollution abatement grant. The

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sovereign within certain areas. On the other hand, Tribes do not have all attributes of sovereignty and are not independent, as evidenced by the trust relationship, in which the Federal government is to act in the Tribe's interest. These issues continue to evolve both in Agency policy and in judicial caselaw.

[16]CWA § 518(e)(3), 33 USC § 1377(e)(3); 40 CFR §130.6(d)(3).

Penobscots have had a water quality monitoring program in place since June of 1989, which has conducted numerous studies on water and wildlife conditions.

The Penobscots have also been successful in operating their multi-media grant from EPA. The original grant was made in 1991; in 1992, when the award was scrutinized by Federal officials, additional funds were provided for a total of $152,192.

The Tribe's application contains a detailed description for the assessment of surface and ground water needs and a general protection program that would be operated by a trained staff of professionals. In addition, the Penobscots have established the necessary administrative and judicial systems to ensure the program's proper administration.

Over the last few years, the Penobscot Nation has successfully sought and administered $3.25 million of grant funds from nine grants. These grants include ones from the U.S. Department of Interior's Bureau of Indian Affairs for social services, wildlife management, and real estate services programs for grant funds totalling $725,190. The Penobscots have also administered a $2 million grant from the U.S. Indian Health Services for a health services program and a $200,000 grant from the U.S. Department of Vocational Education for a vocational services program. The Penobscots have already successfully administered other EPA grants: a multimedia grant of $104,581 and a wetland protection grant of $46,875. Finally, the Penobscot Nation has administered state human service grants from Maine for children's and substance abuse issues that total $103,723.

Furthermore, the Penobscot Nation has in place a system of accounting for federal grant funds which meets the standards listed in 276.7 CFR Part 25 entitled "Standards of Grantee Financial Management Systems." The Tribe has administered seven Federal grants and two State grants for a total of about $3,249,441 in grant funds.

I conclude that the Penobscots have made the requisite showing of capability to administer a CWA § 106 grant.

D. <u>The Tribe is "recognized by the Secretary of Interior and exercising [sic] governmental authority over a Federal Indian Reservation"</u>[17]

The Penobscot Nation is listed on the current list of federally recognized Tribes established and maintained by the Secretary of the Department of Interior. A current list is also kept at EPA headquarters.

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[17]CWA § 518(h)(2), 33 U.S.C. § 1377(h)(2); 40 CFR §130.2(b).

I conclude that the Penobscots have made the requisite showing of being a federally recognized Tribe.

IV. Conclusion

For the reasons noted above, I believe that the Penobscot Nation has met the Clean Water Act § 518(e) standards for Treatment as a State for the limited purposes of Clean Water Act (CWA) § 106 grant activities.

I recommend that the EPA Region 1 Regional Administrator determine that the Penobscot Nation has met the requirements to be treated as a state under CWA § 518(e)(2) for and limited to the purpose of receiving and administering a CWA § 106 water quality monitoring grant.